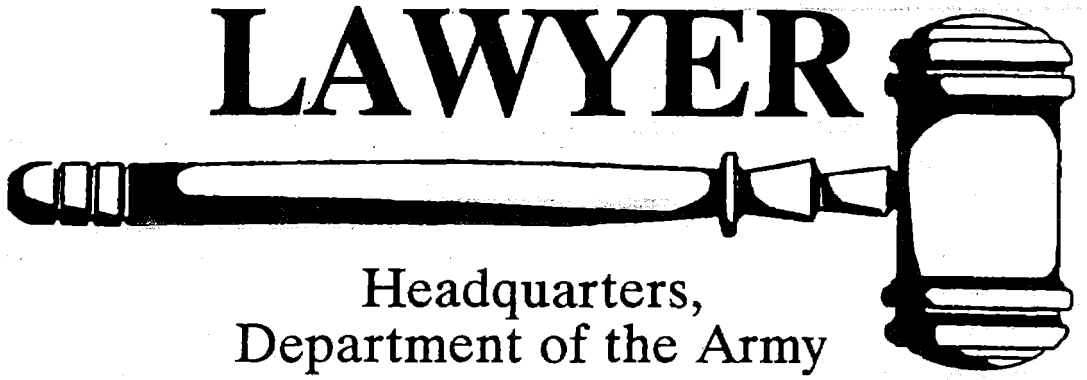
THE ARMY LAWYER



Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-253
December 1993

Table of Contents

The Army Lawyer (ISSN 0364-1287)

Editor
Captain John B. Jones, Jr.

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index,* and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Address changes: Reserve Unit Members: Provide changes to your unit for SIDPERS-USAR entry. ***IRR, IMA, or AGR:*** Provide changes to personnel manager at ARPERCEN. ***National Guard and Active Duty:*** Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Immigration and the Foreign Spouse: How Spouses Can Get Their Own Green Cards

Major Elena Kusky, United States Army Reserves
311th COSCOM, Los Angeles, California

Introduction

With the planned reduction in the number of forces authorized to be stationed overseas, more service members likely will be returning to the United States with foreign, or "alien" spouses. This article focuses on the process of obtaining a visa and lawful permanent residence for an alien spouse. Pertinent portions of the Immigration and Nationality Act of 1990 (IMMACT 1990) will be discussed.[1] This article will not discuss how to obtain visas and permanent residence for children, although many of the amended requirements in the Immigration and Nationality Act apply to immigrating children.[2]

Two maxims must be stressed when advising clients about the immigration process. First, acquiring a visa and lawful permanent residence (hereinafter LPR) status is a *privilege,* not a right.[3] The mere status of being married to a United States citizen does not automatically convey any benefits on the alien spouse. Paperwork, known as the visa petition, *must* be filed before any lawful status can be acquired. Second, the burden of proof in obtaining this visa and LPR status, with very few exceptions, rests with the alien and his or her spouse.[4]

Before describing the precise mechanics of the immigration process, the following overview is presented in a simplified format merely to provide the immigration neophyte with an outline of how the process of obtaining a "green card" works. Two different types of visas will enable aliens to enter the United States: the immigrant visa (the green card), and the nonimmigrant visa (which can be a tourist visa, or a student visa, among others). Immigrant visas can be obtained overseas by applying at local consular offices. Assuming that an immigrant visa has been approved, it is stamped in the alien's passport. On the day the alien enters the United States for the first time with the immigrant visa, the alien is deemed to become a "lawful permanent resident" of the United States who is entitled to carry a green card.

If an alien does not obtain an *immigrant* visa overseas in order to enter the United States, the nonimmigrant or "tourist" visa is available. These visas are available to aliens who are *not* intending to remain in the United States permanently. If circumstances change *after* they have entered the United States using a nonimmigrant visa, and they wish to become green card holders, immigrant visas can be petitioned for on their behalf and applications made to adjust their status to that of lawful permanent residents.

Obtaining a green card while still outside the United States is a one-step procedure. If no reasons exist to exclude the alien at the port of entry—the airport, seaport, or land border crossing—by entering the United States *with* an immigrant visa, an alien is deemed to be a lawful permanent resident. An alien who enters the United States with a nonimmigrant visa, however, has the status of being a "visitor" to the United States. If an alien has entered the United States as a visitor and applies for an immigration visa which is later approved, the alien then must formally apply to have his or her status adjusted to that of an LPR because obtaining a green card while *in* the United States is a two-step process. Merely having an approved immigrant visa in the United States does not guarantee that an adjustment of status will be granted because that is a discretionary application.

The preceding overview was intended as a quick and elementary introduction to the difference between obtaining a visa overseas and obtaining an immigrant visa in the United States. The actual mechanics are more complicated and therefore, are discussed in greater detail in this article.

Obtaining the Visa

All persons who are not citizens of the United States must have the proper documents to enter the United States.[5] All aliens are presumed to be immigrants unless they prove to the satisfaction of the Immigration and Nationalization Service

---

[1] Immigration and Nationality Act § 241(a), 8 U.S.C. § 1254(a) (1982) [hereinafter INA]. The new grounds for exclusion became effective for aliens entering on or after June 1, 1991; *see* Immigration and Nationality Act of 1990 § 601(e); 8 U.S.C.A. § 1101 (West Supp. 1993, at 19) [hereinafter IMMACT 1990]. The law existing prior to the effective date of the amendments still may be viable in individual cases. The grounds for an alien's exclusion from the United States are determined by the law existing at the time of their *entry.*

[2] For a basic discussion of immigrating children under the INA, see generally Hancock, *Legal Assistance and the 1986 Amendments to the Immigration, Nationality and Citizenship Law,* ARMY LAW., Aug. 1987, at 11.

[3] *See* Kleindienst v. Mandel, 408 U.S. 753 (1972); *see also* Murphy, *Immigration and Nationality Law for the Military Lawyer,* 36 A.F. L. REV. 101 (1992); Bettwy, *Assisting Soldiers in Immigration Matters,* ARMY LAW., Apr. 1992, at 3; Sandulescu, *The Pitfalls of Using the Visa Waiver Program to Bring Alien Spouses into the United States,* ARMY LAW., Jan. 1993, at 47.

[4] INA § 291(a), 8 U.S.C. § 1361 (1990).

[5] INA §§ 211, 212(a)(7), 8 U.S.C. §§ 1181, 1182(a)(7) (1990).

(the Service) that they are valid nonimmigrants.[6] Because all aliens are presumed to be immigrants, they must possess valid immigrant visas, in the absence of any waiver of that requirement.[7] If the alien does not have a valid visa or a waiver, he or she will not be admitted into the United States. Keep this in mind when advising the legal assistance client on the process of obtaining an immigrant visa. A common scenario involves a service member married to a foreign national inquiring how to get the spouse legally into the United States and how to obtain a green card. A legal assistance officer should explain that the process of obtaining an immigrant visa begins with the filing of a *Form I-130*[8] by the petitioning spouse—that is, the service member—on behalf of the beneficiary alien spouse[9] and that this process can take place in the United States or overseas, depending on where the petitioner is currently residing.[10] An interview may be scheduled to review the petition and supporting documents and to question both parties.

To be statutorily entitled to be issued a visa, both the alien and the marriage must pass certain tests. The spouses must be lawfully married according to the customs of the location in which they married.[11] Any prior marriages by either party must have been properly terminated.[12] Documentation proving both must be submitted at the time of the scheduled interview or as requested if no interview is scheduled.[13] The beneficiary must obtain a medical exam,[14] a police certificate, a military certificate, and birth record.[15] Police certificates and medical exams are only valid for one year from the date obtained.[16] All of the documents must be certified.[17] If the petition is approved,[18] that is, the bona fides of the marriage are established, that approval does not automatically result in the alien spouse receiving an immigrant visa. If the beneficiary alien spouse is residing in a different location than where the petition was filed and approved, notice of the approval must be forwarded to the consular office in the district in which the alien spouse is now living.[19] The alien spouse then must apply for an immigration visa based on the approved petition.[20]

In support of that application, the alien must appear for a personal interview.[21] At that time, the submitted application will be sworn to as the truth and then signed in front of the immigration or consular officer.[22] The alien will be questioned on the submitted documents and on other contents of the application.

The submitted documents will indicate whether any possible grounds exist for excluding the alien from the United States. Exclusion is the process of not allowing the alien to make an "entry" into the country. Under certain situations, however, these grounds can be waived.[23] If required, a waiver application must be submitted with the other documents and

---

[6] INA § 214(b), 8 U.S.C. § 1184(b) (1991).

[7] INA §§ 211, 212(a)(7)(A), 8 U.S.C. §§ 1181, 1182(a)(7)(A) (1990).

[8] Immigration & Naturalization Serv., Form I-130, Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa (28 Feb. 1987).

[9] INA § 204(a)(1)(A)(B), 8 U.S.C. § 1154(a)(1)(A)(B) (1990); 8 C.F.R. § 204.1(a) (1990).

[10] *See* 8 C.F.R. § 204.1(e) (1993); 22 C.F.R. § 42.61(a) (1990); *see also* Immigr. Law Serv. (LCP BW) (1985) § 5:36; supp. to Binder 1 (LCP) (Sept. 1990); supp. to Binder 5 (LCP) § 36:92 (Sept. 1990) for an updated discussion on where to file the petition overseas.

[11] Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), *cert. denied,* 458 U.S. 1111 (1982); *In re L,* 7 I&N (BIA) 587 (1957).

[12] Lokko v. INS, 594 F. Supp. 623 (N.Y.S. 1984); *In re* Luna, 18 I&N (BIA) 385 (1983).

[13] 8 C.F.R. § 204.2(a) (2) (1990); 22 C.F.R. § 42.63 (1990).

[14] INA § 221(d), 8 U.S.C. § 1201(d) (1982); United States military facilities and physicians are not authorized to conduct these exams. However, if an alien requires treatment of an ailment that may exclude him from the United States, he or she can be treated at the military facility and the physician can certify completion of treatment to the authorized panel of physicians.

[15] INA § 222(b); 22 C.F.R. § 42.111(b)(1), (3), (4) (1990).

[16] 22 C.F.R. § 42.113 (1990); 22 C.F.R. § 42.65 (1990).

[17] INA § 222(b), 8 U.S.C. § 1202(b) (1990).

[18] If the *I-30* petition is denied, that is, the petitioner has not established the relationship or bona fides of the marriage with the beneficiary alien spouse, that denial can be appealed to the Board of Immigration Appeals. *See* 8 C.F.R. § 3.3 (1990).

[19] 22 C.F.R. § 42.41 (1990).

[20] *Id.*

[21] 22 C.F.R. § 42.114 (1990).

[22] INA § 222(e), 8 U.S.C. § 1202(e) (1990); 22 C.F.R. § 42.67(a)(2) (1990).

[23] *See generally,* INA § 212 (1990), 8 U.S.C. § 1182 (1990); 8 C.F.R. § 212.7 (1990). Waivers are approved only through a favorable exercise of discretion.

the *I-130* petition.[24] After the interview, the alien will be told whether the visa will be issued or has been refused.[25] If refused, the reasons for such refusal must be in accordance with regulation or law, and the alien must be informed of those reasons and the manner in which the refusal can be overcome.[26] The principal consular office must review the case of an alien who has been refused an immigrant visa and must record this decision.[27] If he or she nonconcurs in the refusal, then the case must be referred to the Department of State for an opinion or the principal consular officer must take responsibility for the case. If the Department of State reverses the refusal, the consular officer must promptly notify the applicant alien spouse of such reversal.[28]

Grounds for Exclusion and Waivers of Excludability

When a service member reveals that his or her spouse has a minor criminal history, the legal assistance officer should advise the service member that Congress has the right to regulate its borders and place reasonable restrictions on those seeking to immigrate into the United States. Accordingly, grounds that will exclude certain classes of aliens are identified by statute.[29] Conversely, Congress is concerned that families be able to remain together. Therefore, various waivers of exclusion—that are contingent on an alien's relationship to a United States citizen or lawful permanent resident of the United States—also have been written into the statutes.[30]

Aliens who have been convicted of a crime involving moral turpitude or who *admit* to having committed such a crime are excludable from the United States and would need a waiver to be issued a visa.[31] However, three possible *exceptions* to the general rule of excludability exist. An exception to a ground of excludability differs from a waiver of that ground. If the alien's circumstances fit the defined exception, the ground of exclusion no longer applies to him, and he or she will be admitted to the United States. Alternatively, in applying for a waiver, the alien first must meet the statutory requirements and a waiver application is granted or denied in the Service's discretion. An exception completely removes the ground of exclusion, however, so that discretion to exclude is not a factor.

The first *exception* to the general rule of excludability for crimes involving moral turpitude is the "juvenile" exception. This ground of exclusion does not apply when: an alien was under the age of eighteen at the time the act was committed; only one such crime was committed; and—at the time of application for the visa or admission to the United States—more than five years have passed since the act was committed (and since release from confinement, if confined as a result of the act).[32] The second exception addresses convictions for purely political offenses.[33] The third exception involves convictions for "petty offenses." This exception applies if the maximum sentence to which the alien could have been sentenced did not exceed one year *and* his or her *actual* sentence did not exceed six months (even though suspended) and he or she has only *one* such offense or conviction.[34] If the alien merely admitted to having committed a petty offense crime—and no conviction exists—then the exception requires that he or she *could have* been sentenced to no more than one year. If the alien has not admitted to committing the act, but there appears to be a conviction, the legal assistance attorney should determine whether the conviction satisfies the definition of a "conviction" as used within the meaning of the Act, as interpreted by case law.[35]

Aliens who have been convicted of two or more crimes, whether or not a single scheme or involving moral turpitude,

---

[24] 8 C.F.R. § 212.7(a)(b) (1990).

[25] 22 C.F.R. § 42.117 (1990).

[26] 22 C.F.R. §§ 42.130(a), 42.117, 42.90 (1990).

[27] 22 C.F.R. §41.130(b) (1990).

[28] 22 C.F.R. §§ 41.130(b), 42.130(b).

[29] *See generally*, INA § 212 (1990), 8 U.S.C. § 1182 (1990).

[30] *See supra* note 23.

[31] INA § 212(a)(2)(A), (2)(F) (1990), 8 U.S.C. § 1182 (a)(2)(A), (2)(F) (1990). Moral turpitude has been defined variously as "anything done contrary to honesty" or an act of "baseness or depravity." *In re* Sloan, 12 I&N (BIA) 840 (1966); *In re* Awaigane, 14 I&N (BIA) 117 (1972).

[32] INA § 212(a)(2)(A)(ii)(I) (1990), 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (1990).

[33] INA § 212(a)(2)(A)(i)(I) (1990), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1990).

[34] INA § 212(a)(2)(A)(ii)(II) (1990), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (1990). The last exception was amended for aliens entering after June 1, 1991. Previously, the length of time to which the alien *could have been sentenced* was not relevant. So long as the alien was sentenced to six months or less, the maximum possible sentence was not considered. The 1990 Amendments added the ceiling of no more than a one year possible sentence.

[35] A conviction must be final before it can be used as a ground of deportation or exclusion. There are many aspects to convictions that may not make them final so that the alien may not be excludable. *In re* Ozkok, 19 I&N (BIA) 546 (1988) defines the term "conviction."

and who have been sentenced to an aggregate of five or more years confinement are excludable.[36]

Narcotics convictions are serious. Anyone convicted under state, federal, or foreign law of an offense relating to a controlled substance or anyone who admits to having committed any acts violating such laws is excludable.[37] *No* exceptions to this ground of excludability relating to narcotics offenders exist, although a waiver is available for a certain class of aliens. Further, any alien whom a consular or immigration officer knows or "*has reason to believe*" is a trafficker, or has knowingly assisted traffickers, is excludable.[38] Trafficking includes convictions for possession with intent to sell as well as actual sales.[39] Moreover, to satisfy the statutory provision relating to an officer's knowledge of an alien's trafficking, no conviction is required.[40] For example, if an alien is found attempting to enter the United States while smuggling drugs and enters into a plea bargain that allows the alien not to be prosecuted in exchange for providing information about his or her sources, that alien still is excludable as one whom an immigration officer knows, or has reason to believe, is a trafficker.

Waivers for convictions for crimes other than narcotics offenses generally are available for spouses, parents, and sons and daughters of United States citizens and LPRs.[41] To obtain the waiver, the alien has to prove "extreme hardship" to their citizen or LPR spouse or children and that his waiver is warranted in the exercise of discretion.[42]

In relation to a narcotics conviction or offense, the above waiver is available to an alien convicted, or who has committed a "*single*" offense, of *simple possession of marijuana* in an amount of less than thirty grams.[43] Possession of any other type of drug precludes an alien from being eligible for the waiver of excludability. Possessing a small amount of marijuana with intent to sell—even in an amount of less than thirty grams—renders the alien ineligible for the waiver.

The term "marijuana" refers to all its derivatives, including cannabis and hemp.[44] The attorney must obtain evidence that the amount of marijuana was less than thirty grams. If not apparent from the face of the conviction record, other evidence will suffice. Police reports and drug analysis lab reports often will contain valuable information and if certified, can be used to support the waiver application.

If the alien has been convicted more than once of simple possession, he or she also is not eligible for the waiver. However, if the first offense was a conviction prior to November 1, 1987, and that conviction was pursuant to a statute identical to the terms of the Federal Youth Corrections Act, the alien may be able to have the first conviction ignored for purposes of determining eligibility for a waiver.[45] Convictions pursuant to that act were not considered convictions within the definition set out by the Board of Immigration Appeals.[46] Similarly, if an alien had been convicted pursuant to a statute identical to the provisions of the federal first offender statute, his or her conviction also might be vitiated.[47]

Aliens also are excludable if they have a communicable disease or a mental illness.[48] They may be eligible for a waiver, however, if married to a United States citizen or LPR.[49] Those with a mental illness may apply for a waiver—but have

---

[36] INA § 212(a)(2)(B) (1990), 8 U.S.C. § 1182(a)(2)(B) (1990).

[37] INA § 212(a)(2(A)(i)(II) (1990), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (1990). Certain exceptions exist, however. If the foreign statute relating to narcotics under which the alien has been convicted states that *guilty* knowledge of the possession is *irrelevant,* then the alien would not be excludable. Lennon v. INS, 527 F.2d 187 (2d Cir. 1975).

[38] INA § 212(a)(2)(C) (1990), 8 U.S.C. § 1182(a)(2)(C) (1990).

[39] 21 U.S.C. § 802 (1990).

[40] Nunez-Payan v. INS, 815 F.2d 384 (5th Cir. 1987); *In re* Favela, 16 I&N (BIA) 753 (1979).

[41] INA § 212(h) (1990), 8 U.S.C. § 1182 (h)(1990).

[42] INA § 212(h)(1)(A)(B), 212(h)(2) (1990), 8 U.S.C. § 1182(h)(1)(A)(B), 212(h)(2) (1990). IMMACT 1990 § 601(h)(1)(A)-(C) accidentally deleted this extreme hardship waiver for family members. The 1991 Technical Amendments to the 1990 IMMACT, however, restored the old "extreme hardship" tests to aliens with the requisite family relationship.

[43] INA § 212(h) (1990), 8 U.S.C. 1182(h) (1990).

[44] See schedule of controlled substances in 21 U.S.C. § 802 (1991).

[45] *See* Immigr. Law Serv. (LCP BW) (1985), supp. to Binder 1 (LCP) § 4:77 (Sept. 1990).

[46] *See supra* note 35.

[47] *See* Immigr. Law Serv. (LCP BW) (1985), supp. to Binder 1 (LCP) § 4:78 (1990).

[48] INA §§ 212 (a)(1)(A)(i)(ii) (1990), 8 U.S.C. § (a)(1)(A)(i)(ii) (1990).

[49] INA § 212(g)(1)(A), (B) (1990), 8 U.S.C. § 1182(g)(1)(A), (B) (1990).

the additional requirement of posting a bond—and the waiver only can be granted after consultation with the Secretary of Health and Human Services.[50] An alien who has been determined to be a drug abuser or drug addict is excludable from the United States without recourse to any waiver.[51]

Aliens are excludable if, at the time they apply for their visa, for admission to the United States—that is, they are at the port of entry when holding out their passport—or for adjustment of status, they are deemed likely to become a "public charge."[52] A bond usually is required to be posted.[53] An immigration or consular officer may be satisfied, however, if the petitioning spouse submits affidavits of support showing an ability to prevent the alien from becoming a public charge.[54]

A new ground of excludability in the IMMACT 1990 relates to international child abductors. If an alien withholds custody of a United States citizen child outside the United States—when custody had been granted pursuant to court order to a United States citizen—that alien is excludable until the child is returned to the proper custodian.[55]

The IMMACT 1990 has changed the Immigration and Nationality Act relating to aliens involved in prostitution. If the alien has engaged in prostitution, received proceeds from prostitution in the ten years preceding the application for a visa, or is coming to the United States to engage in prostitution, even "incidentally," the alien is excludable from the United States.[56] If ten or more years has passed since the alien engaged in prostitution or procuring, or has received proceeds from prostitution, then the alien is not excludable. If less than ten years has passed since the excludable act occurred, a waiver of this ground of excludability—pursuant to § 212(h) of the Act—is available to an alien who is either a spouse, parent, or child of a United States citizen or LPR, is not a threat to national security, and has been rehabilitated.[57]

Finally, an alien is excludable if he or she fraudulently or willfully misrepresented a material fact to procure a visa or entry into the United States.[58] For example, when an alien—fearful that his or her criminal record will prevent the acquisition of a visa—lies about it on the sworn application, he or she may be excludable as having used fraud to procure a visa. A waiver is available for that ground of excludability if the alien is married to a United States citizen or LPR and the alien is otherwise admissible.[59]

Although other grounds of excludability exist, the aforementioned examples are those grounds that legal assistance officers most likely will encounter.

Other Bars to Obtaining a Visa

Would it make a difference to a current petition if a service member reveals that his or her green card was obtained as a result of a previous marriage or that the service member's spouse had previously married someone to obtain a green card?

Several other statutory grounds exist as bars to obtaining a visa for which there are no waivers. Rather, they are conclusions of law based on statutory language, regulation, and existing case law. These conclusions may be overcome by evidence in support of the alien's position or, sometimes, merely the passage of time.

The first ground only will affect an alien who is married to an LPR. If the LPR who is petitioning for the spouse acquired *his or her* own LPR status through a prior marriage to a United States citizen or LPR, then the visa petition for their present spouse cannot be approved until at least five years has passed since the date the petitioner obtained his or her LPR status.[60] This statutory provision creates the presumption that the prior marriage was entered into solely for the benefit of the present petitioning spouse to obtain his or her green card, divorce the person who enabled the present petitioner to attain that objective, and then later marry his or her "true love" to immigrate that individual.

---

[50] INA § 212(g)(2) (1990), 8 U.S.C. § 1182(g)(2) (1991).

[51] INA § 212(a)(1)(A)(iii) (1990), 8 U.S.C. § 1182(a)(1)(A)(iii) (1990).

[52] INA § 212(a)(4) (1990), 8 U.S.C. § 1182(a)(4) (1990).

[53] INA § 213 (1990), 8 U.S.C. § 1183 (1982); 8 C.F.R. § 213.1 (1990).

[54] 22 C.F.R. § 40.7(a)(15) (1990); *In re* Kohama, 17 I&N (BIA) 257 (1978).

[55] INA § 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C) (1990).

[56] INA § 212(a)(2)(D)(i)(ii) (1990), 8 U.S.C. 1182(a)(2)(D)(i)(ii) (1990).

[57] INA § 212(h)(1)(A)(B), 212(h)(2) (1990), 8 U.S.C. 182(h)(1)(A)(B), 212(h)(2) (1990). If more than ten years has passed since the alien engaged in prostitution or received proceeds from prostitution, then no waiver is needed because the ground for exclusion does not apply in that circumstance.

[58] INA § 212(a)(6)(C)(i) (1990), 8 U.S.C. § 1182(a)(6)(C)(i) (1990).

[59] INA § 212(6)(C)(ii), 212(d)(5)(i)(1) (1990), 8 U.S.C. § 1182(6)(C)(ii), 1182(d)(5)(i)(1) (1990).

[60] INA § 204(a)(2)(A)(i) (1990), 8 U.S.C. § 1154(a)(2)(A)(i)(1982); 8 C.F.R. § 204.2(a)(1)(i) (1993).

Given that presumption, two exceptions to this five-year waiting period exist. First, if the prior marriage was terminated by the death of the prior spouse, the alien petitioner does not have to wait five years before filing a petition for his or her present spouse.[61] Second, if the alien spouse can establish by "clear and convincing evidence" that the prior marriage was not entered into to evade immigration laws, the presumption will be rebutted, and the five-year waiting requirement will not apply.[62] The alien petitioner has the burden to present whatever proofs he or she may wish to establish the validity of the prior marriage, including witnesses at the alien petitioner's own expense or documentary evidence.[63]

Prior to the IMMACT 1990, a blanket prohibition existed against approving visas for aliens who married during the pendency of their deportation or exclusion proceedings until the alien had resided outside the United States for two years after the marriage.[64] The presumption was that anyone who entered into a marriage during those proceedings did so as a fraud to remain in the United States and to avoid deportation or exclusion.[65] Critics felt that portion of the Immigration Marriage Fraud Amendments was unduly harsh. Consequently, the IMMACT 1990 amended that portion to provide an exception to the general rule by allowing the alien and spouse to prove the bona fide nature of their marriage, and, if successful, to have the visa petition approved.[66] If the spouses cannot prove by clear and convincing evidence that their marriage is bona fide, the bar still applies.[67]

Another statutory bar to a grant of a visa petition occurs when the current intended beneficiary previously had entered into a "green card" marriage. If the alien is found to have entered into such a marriage—that is, married with the sole purpose of evading the immigration laws to obtain an immigration benefit, the green card—or has *attempted* to enter such a marriage, the alien is precluded from *ever* being the beneficiary of a visa petition.[68] Consequently, if an alien spouse of a United States citizen or LPR has been married previously, and evidence exists in the administrative file maintained on the alien by the Service that this prior marriage was a "sham," the alien spouse is precluded from ever receiving an immigrant visa.

Finally, if the *present* marriage is determined to be a "sham,"—that is, entered into so that the alien spouse may obtain an immigration benefit—the petition will be denied. A sham marriage exists if the bride and groom did not intend to establish a life together at the time they married.[69]

Other Visas and Adjustment of Status in the United States

What options exist for a service member who does not have the time to get an immigrant visa, or whose spouse is not sure whether he or she wants to live in the United States permanently? Are there other ways that the spouse can enter the United States to stay temporarily?

If for some reason the service member does not, or cannot, obtain an *immigrant* visa for his or her spouse prior to leaving the overseas assignment, other visas are available that may enable the spouse to enter the United States temporarily. There are, however, disadvantages to each of them, especially if the intent is to have the alien spouse reside permanently in the United States on entering the country.

If not married at the time of departure from the overseas assignment, the service member can petition for a K-1 visa to be issued the alien fiance.[70] However, this visa is only available to fiances of United States citizens.[71] Furthermore, the marriage must take place in the United States within ninety days of admission into the United States.[72] After the mar-

---

[61] INA § 204(a)(2)(B) (1990), 8 U.S.C. § 1154(a)(2)(B) (1990); 8 C.F.R. § 204.2(a)(1)(i)(A)(2) (1993).

[62] INA § 204(a)(2)(A)(ii) (1990), 8 U.S.C. § 1154(a)(2)(A)(ii) (1990); 8 C.F.R. § 204.2(a)(1)(i)(A)(1) (1993).

[63] 8 C.F.R. § 204.2(a)(1)(B)(i) (1993). However, if five years since the petitioner attained LPR status elapses *during* the pendency of the alien's visa petition proceedings—even during an ensuing appeal—the burden of presenting clear and convincing evidence to rebut the statutory presumption *no longer* exists. *In re* Pazandeh, 19 I&N (BIA) 884 (1989).

[64] INA § 204(h), 8 U.S.C. § 1154(h) (1990); INA § 245(e), 8 U.S.C. § 1255(e) (1990); 8 C.F.R. § 204.1(a)(2)(ii) (1990).

[65] Anetekhai v. INS, 876 F.2d 1218 (5th Cir. 1989).

[66] INA § 245(e)(3) (1990), 8 U.S.C. § 1255(e)(3) (1990); 8 C.F.R. § 204.2(a)(1)(iii) (1993).

[67] INA § 204(g) (1990), 8 U.S.C. § 1154(g) (1990).

[68] INA § 204(c) (1990), 8 U.S.C. § 1154(c) (1990); 8 C.F.R. § 204.2(a)(1)(ii) (1993).

[69] Garcia-Jaramillo v. INS, 604 F.2d 1236 (9th Cir. 1979), *cert. denied,* 449 U.S. 828 (1979); *In re* Suriano, Int. Dec. (BIA) 3081 (1988).

[70] INA § 101(a)(15)(K) (1990), 8 U.S.C. § 1101(a)(15)(K) (1990); 8 C.F.R. § 214.2(k).

[71] *Id.*

[72] 8 C.F.R. § 214.2(k)(5) (1990).

riage—to adjust their status from that of a fiance with a K-1 visa to that of a spouse with an immigrant visa—the alien must file an application for adjustment of status on *Form 1-485*.[73] The alien spouse is only granted conditional residence status for a period of two years upon the approval of the adjustment of status application.[74] After that period, the service member and spouse can apply to have the conditional residence terminated and the spouse then will acquire *permanent* resident status.[75]

A major benefit of the above method is that the alien is given employment authorization—that is, permission to work in the United States—upon being granted the petition for a K-1 visa.[76] The types of visas that will be discussed next do not ordinarily permit an alien to work in the United States. An alien who proves that he or she has complied with the strictures of the fiance visa and has entered into a valid marriage is almost automatically granted adjustment of status in the United States (assuming there are no grounds for exclusion) because adjustment under this section is not discretionary.[77]

An alien fiance or spouse who enters the United States using any of the *other* visas described herein will be violating its provisions *if* they entered the United States with a preconceived intent to stay,[78] stay longer than permitted,[79] or work in violation of their nonimmigrant status.[80] These are factors that will weigh against permitting them to adjust their status in the United States, regardless of the bona fide nature of the marriage, because adjustment of status is a discretionary application.[81]

Another visa available for entering the United States is the B-1/B-2 tourist visa.[82] The tourist visa requires that the alien have an unrelinquished domicile in their country of residence[83] and it does not permit an alien to work in the United States.[84] The biggest drawback to this type of visa usually manifests itself at the airport when the alien spouse arrives and is inspected by an immigration officer. Questioning the alien on the marital status, where the spouse lives, and whether the alien intends to reside with that spouse, immediately will demonstrate the spouse's true intentions in entering the United States.[85] If the immigration officer believes that the spouse is coming to live with the service member without benefit of an immigrant visa, the alien spouse may be detained.[86] At that point, the alien has only two options, to withdraw the application for admission at the port of entry and return to their country of residence,[87] or to be paroled into the United States for purposes of appearing before an immigration judge in exclusion proceedings.[88]

---

[73] Immigration & Naturalization Serv., Form I-485, Application for Permanent Residence Status or Creation of a Record of Lawful Permanent Residence (27 Feb. 1987).

[74] INA § 245(d) (1990), 8 U.S.C. § 1255(d) (1990); 8 C.F.R. § 214.2(k)(6)(ii) (1990).

[75] 8 C.F.R. § 216.4 (1993).

[76] 8 C.F.R. § 274a.12(a)(6) (1990).

[77] *In re* Dawson, 16 I&N (BIA) 693 (1979).

[78] *In re* Battista, 19 I&N (BIA) 484 (1987).

[79] INA § 241(a)(1)(C)(i) (1990), 8 U.S.C. § 1251(a)(1)(C)(i) (1990).

[80] *Id.*

[81] Patel v. INS, 738 F.2d 239 (7th Cir. 1984); *Battista*, 19 I&N at 484. Aliens who are not in a lawful status at the time they apply for adjustment cannot, by statute, adjust their status in the United States. INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) (1990). An exception exists allowing spouses of United States citizens who have been engaged in unauthorized employment or who are not in a lawful status to be adjusted in the United States. *Id.* Statutory eligibility does not automatically result, however, in a grant of adjustment of status because it *is* a discretionary application.

[82] INA § 101(c)(15)(9) (1990), 8 U.S.C. § 1101(a)(15)(B) (1990).

[83] *Id.*

[84] *Id.* An exception exists if the alien is, under the terms of the visa, coming to the United States to engage in prearranged business for a foreign employer.

[85] INA § 235(a) (1990), 8 U.S.C. § 1225(a) (1990). The alien should not make false statements to the officer about their marital status because such misrepresentations also may lead to exclusion of the alien from the United States. *See supra* note 59.

[86] 8 C.F.R. § 235.3(c) (1990).

[87] 22 C.F.R. § 41,122 (b)(3) (1990). If granted permission to withdraw, the nonimmigrant visa will be cancelled and no longer will be valid for future use.

[88] INA § 235(b), 8 U.S.C. 1225(b) (1990). Paroling an alien into the United States means they have not made an "entry" into the United States as defined in the Act. The physical presence in the United States of the alien spouse is a legal fiction, in that a parolee in reality, is not in the United States.

Once paroled into the United States, the alien spouse can have a *Form I-130* filed on his or her behalf with the Service by the service member spouse.[89] All the processing described above in the section on obtaining a visa applies at that point. If the visa is approved, however, the alien spouse *still* does not obtain immigrant status. He or she *must* apply for adjustment of status.[90]

The immigration judge does not have the authority to grant a visa petition nor any authority in exclusion proceedings to grant the alien an adjustment of status, even if the Service has approved a visa petition.[91] Therefore, if the alien is in exclusion proceedings and the Service denies the adjustment of status application, the alien will be excluded from the United States. As a result of this exclusion order, the alien will then have to apply for specific permission to reenter the United States at a later date. This permission is required in addition to the visa.[92]

If the alien has been properly admitted at the airport with a B-1/B-2 nonimmigrant visa, and was *not* placed in exclusion proceedings, the alien has made an entry into the United States.[93] The alien also is eligible to apply for adjustment of status with the Service as one who has been inspected and admitted.[94] In that case, the service member can file the *Forms I-130,* visa petition, and *I-485,* adjustment of status application, simultaneously with the district director having jurisdiction over the application, which is usually the place of residence.[95] If the visa petition is denied, the petitioning spouse can appeal that denial to the Board of Immigration Appeals.[96] If the petition is approved, but the adjustment is denied, there is no such appeal right.[97] The alien will have to depart the United States, or, if the alien has violated the conditions of the visa, be placed in deportation proceedings.[98]

If the immigration inspectors do not admit the alien at the airport, an entry into the United States has *not* been made and the alien will be placed in exclusion proceedings as described above. Aliens who are admitted and later violate the conditions of their admission—such as overstaying their visa or working without a permit—are placed in deportation proceedings. This distinction is important because the immigration judge in deportation proceedings *has* the authority to adjust an alien's status.[99] Therefore, even if the Service denies the adjustment of status application, the judge still can grant it if the alien had made an entry into the United States.

The alien fiance or spouse also may enter the United States via the visa waiver pilot program.[100] This program was instituted as a test to allow residents of certain countries to enter the United States without having to obtain a visa. If the alien's country of residence is a designated country under this program, a visa is not necessary, so long as the alien has a valid passport, roundtrip ticket (if arriving at an airport), and stays no longer than ninety days.[101] Further, the alien waives all rights to appear before an immigration judge if the alien

---

[89] 8 C.F.R. § 204.1(a) (1993).

[90] INA § 245(a) (1990), 8 U.S.C. § 1255(a) (1990). An immigrant visa may not be immediately available. Whether an immigrant visa is immediately available depends upon whether the alien is an immediate relative (in which case, there is no waiting for a visa) or is married to an LPR and thus is only eligible for a second preference designation. An immediate relative is the spouse of a United States citizen; *see* INA § 201(b) (1990), 8 U.S.C. § 1151(b) (1990). *No* numerical limitations on admitting immediate relatives exist. A spouse of an LPR will have to wait a period of time for a visa to become available due to the numerical limitations; *see* INA § 203(a)(2) (1990), 8 U.S.C. § 1153(a) (1990); 8 C.F.R. § 245.2(a)2)(i) (1993).

[91] 8 C.F.R. § 245.2(a)(1) (1990); *In re* Manneh, 16 I&N (BIA) 272 (1977). The only exception to this lack of authority by an immigration judge during exclusion proceedings to adjust an alien's status is if the alien spouse had received advance parole to reenter the United States and is in exclusion proceedings as a result of this advance parole. 8 C.F.R. § 236.4 (1990). Advance parole occurs if an alien who is applying to adjust his or her status in the United States has to leave the United States before a decision can be made on the petition, but applies to the Service for advance permission to reenter the United States to continue processing the adjustment application. On return to the United States, the alien is "paroled in" pursuant to the advance parole. If the Service denies the pending adjustment of status application, the alien has the right to renew the request for adjustment of status in the exclusion proceedings before the immigration judge. *Id.*

[92] INA § 212(a)(6)(A) (1990), 8 U.S.C. § 1182(a)(6)(A) (1990).

[93] INA § 101(a)(13) (1990), 8 U.S.C. § 1101(a)(13) (1990); *In re* Areguilla, 17 I&N (BIA) 308 (1980).

[94] INA § 245(a), 8 U.S.C. § 1255(a) (1990).

[95] 8 C.F.R. § 245.2(a)(1) (1993).

[96] 8 C.F.R. § 204.2(a)(3) (1993).

[97] If the alien is in a lawful status, the denial will be certified to the Associate Commissioner of Examinations. 8 C.F.R. § 103.1(s)(2) XXXII (1993). If the alien is *not* in a lawful status—that is, the authorized period of their stay has expired—*see supra* note 99.

[98] 8 C.F.R. § 245.2(a)(5)(ii) (1990).

[99] 8 C.F.R. § 245.2(a)(5)(ii) (1993).

[100] INA § 217 et. seq., 8 U.S.C. § 1187 et. seq. (1990); 8 C.F.R. § 217 et. seq. (1993).

[101] 8 C.F.R. § 217.2(a)(1)-(4) (1990).

disagrees with the immigration officer's determination that he or she is not admissible to the United States.[102] Consequently, if the alien is denied admission because the immigration officer believes that the alien is coming to the United States in violation of the terms of the visa waiver pilot program, the alien must leave the United States immediately without recourse to the immigration judge.[103]

If the alien has been admitted under the provisions of the visa waiver pilot program, and the alien is an immediate relative—that is, a spouse of a United States citizen—the alien can apply for an immigrant visa and adjustment of status in the United States with the district director.[104] If adjustment is denied, the district director can deport the alien.[105] Because the alien will *not* be placed in either deportation *or* exclusion proceedings, the alien will not see an immigration judge if admitted pursuant to the terms of this program.

Finally, an alien may attempt entry into the United States with just a military dependent identification card. This effort will, as a practical matter, probably not succeed. First, the alien is usually required to travel with his or her spouse on official orders.[106] Second, even if the spouse was successful in entering the United States, no real benefit would result. Any alien entering with just a military identification card has not been deemed to be inspected. Therefore, they cannot adjust their status in the United States even if the visa petition is approved.[107]

Conditional Residence Status and the IMMACT 1990

Conditional residence status has been discussed previously in an article contained in *The Army Lawyer*.[108] With the passage of the IMMACT 1990, two new waivers have been added to the benefit of alien spouses to allow them to remove the conditional nature of their residence status if they are no longer married.

The first new waiver of the requirement to file a joint petition to remove the conditional residence status requires that the alien demonstrate extreme hardship if the alien's status were to be terminated and he or she had to leave the United States.[109] Whether the marriage was entered into in good faith is not considered in determining whether or not to grant this waiver. Further, the requirement that the alien spouse be the one who terminated the marriage has been removed. Now, either party can end the marriage.[110] Therefore, the waiver application can be adjudicated and approved no matter who ended the marriage, so long as the alien was not at fault in failing to meet the joint petition requirements.[111]

Another new waiver of the requirement to file a joint petition was created to enable the alien spouse to file when either the alien, the alien child, or the United States citizen child was battered, or subjected to extreme cruelty, by the citizen or LPR spouse or parent.[112]

These are crucial changes that should provide relief and protection for the battered spouse or parent of a battered child who wants to leave the service member, but feels constrained by the requirements of their conditional residence status to remain with the service member through the two year period. The other amendment should alleviate the worries of the alien spouse when the service member has initiated the divorce.

Another beneficial change to the Immigration and Nationality Act relates to aliens who were married to United States citizens who have died. If married for at least two years and not legally separated at the time of the citizen's death, the alien may file a petition to become an LPR so long as this is done within two years after the date of death of the United States citizen and prior to the date of the alien's remarriage, if any.[113]

---

[102] 8 C.F.R. § 217.2(a)(5)-(6) (1993).

[103] The district director has the authority to parole the alien spouse into the United States pursuant to 8 C.F.R. § 212.5, notwithstanding the immigration officer's determination that the alien does not meet the requirements of the visa waiver pilot program; *see also* 8 C.F.R. § 217.4(b)(2) (1993).

[104] 8 C.F.R. § 217.3(a) (1990).

[105] 8 C.F.R. § 217.4(c) (1990).

[106] Mundo v. Rosenberg, 341 F. Supp. 345 (C.D. Cal. 1972).

[107] *In re* Lim, 10 I&N (BIA) 653 (1963).

[108] Hancock, *supra* note 2, at 11.

[109] INA § 216(a)(4)(A), 8 U.S.C. § 1186(a)(4)(A) (1990).

[110] INA § 216(a)(4)(9), 8 U.S.C. § 1186(a)(4)(B) (1990).

[111] *Id.*

[112] INA § 216(a)(4)(C) (1990); 8 U.S.C. § 1186(a)(4)(C) (1990).

[113] INA § 201(b)(2)(A)(i) (1990), 8 U.S.C. § 1151(b)(2)(A)(i) (1990); 8 C.F.R. § 204.2(b) (1993).

Aliens in Deportation Proceedings

Can a service member's spouse have his or her green card taken away? Legal assistance officers need to remember that obtaining a green card does not per se give the alien spouse a permanent right to remain in the United States. Spouses can be placed in deportation proceedings *before* becoming a lawful permanent resident if they have violated the status of their visa in the United States or committed any other immigration violations. This can occur in a number of ways. For example, if the spouse's application for adjustment of status was denied by the Service, and the alien spouse has overstayed the visitor's visa or has worked in violation of its conditions, the alien spouse can be placed in deportation proceedings.[114] Once in deportation proceedings, if the immigration judge also denies the alien spouse's application for adjustment of status, the spouse still may be granted the privilege of voluntarily departing the United States rather than being deported.[115] Deportation is the process of removing an alien from the United States at government expense. If deported, an alien must remain outside the United States for five years unless the alien has permission from the Attorney General or his or her delegate to return sooner. If allowed to voluntarily depart the United States, however, the alien spouse is then free to attempt the immigrant visa process again overseas without the need to ask for permission to reenter the United States.

Spouses who have become lawful permanent residents also are subject to deportation proceedings if they commit deportable offenses or assume deportable status. Convictions for crimes committed *after* entering the United States are grounds for deportation.[116] Many of the grounds are the same as those listed as exclusion grounds. Crimes involving moral turpitude have the same definition.[117] An alien will *not* be deportable, however, if convicted of only one such crime or having committed only one such act, *unless* (1) the act was committed within five years of entry into the United States and (2) the alien has been sentenced to serve more than one year in jail (even if the sentence was suspended).[118] If the alien is convicted of two or more crimes involving moral turpitude, the convictions can occur any time after entry, and the amount of time sentenced to be served is irrelevant.[119] To understand the potential serious consequences of the alien's conduct, the legal assistance officer should be aware that petty theft has long been defined as a crime involving moral turpitude.[120]

If an alien has less than seven years of lawful permanent residence, and is otherwise qualified, the alien still can apply for a waiver under § 212(h) of the Immigration and Nationality Act and the case law interpreting its provisions so long as the offense for which the alien has been convicted is not a narcotics offense. To be eligible, the alien must be the spouse of an LPR or United States citizen. The waiver must be submitted in conjunction with an application for adjustment of status while in deportation proceedings.[121] If the alien is deportable because the alien was excludable at the time he or she last entered the United States because of criminal convictions occurring *before* the last departure and reentry, then the alien need only submit the § 212(h) waiver application.[122] The immigration judge will adjudicate the applications.

Previously, § 241(f) of the Immigration and Nationality Act waived a single conviction for simple possession of less than thirty grams of marijuana.[123] The IMMACT 1990 deleted this waiver.[124] The new language *excepted* a single conviction for

---

[114] *See supra* note 98.

[115] INA § 244(e)(1), 8 U.S.C. § 1254(e)(1) (1990).

[116] *See generally,* INA § 241(a), 8 U.S.C. 1251(a) (1990).

[117] *See supra* note 31.

[118] INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) (1990).

[119] INA § 241(a)(2)(A)(ii), 8 U.S.C. § 1251(a)(2)(A)(ii) (1990).

[120] Wilson v. Carr, 41 F.2d. 704 (9th Cir. 1930); *In re* Garcia, 11 I&N (BIA) 521 (1966).

[121] *See* INA § 212(h), 8 U.S.C. 1182(h)(1982); 8 C.F.R. 212.7(a)(ii) (1990); *see infra* note 43. The process of applying for this waiver in deportation proceedings creates a legal fiction. On the same day the alien is found deportable by the immigration judge as a result of their criminal activities, thereby losing the *old* lawful permanent residence status, the alien may obtain a *new* LPR status, *if* the applications for adjustment and waiver of the grounds of excludability are granted. Note, however, that this section only waives certain offenses. It does not waive narcotics offenses.

[122] *In re* Sanchez, 17 I&N (BIA) 275 (1978). In this case, the alien sought to keep his present green card or immigration status by receiving a *nunc pro tunc* waiver of the ground of excludability. This waiver also is available in exclusion proceedings.

[123] INA § 241(f)(2), 8 U.S.C. § 1251(f)(2)(1982). The alien had to prove there would be "extreme hardship" to the citizen or LPR spouse or child.

[124] IMMACT 1990 § 602(b).

simple possession of less than thirty grams of marijuana from being a deportable offense.[125]

Other than the waiver and exception, aliens do not have many other avenues of relief available to them if they have been convicted of crimes, unless they have had a green card for at least seven years. If an alien has been lawfully in the United States for seven years after obtaining a green card and has been convicted criminally, he or she may be eligible for a waiver of deportation under the provisions of § 212(c) of the Immigration and Nationality Act[126] which is a discretionary application for relief. It will not be available to LPRs who have been convicted of offenses defined as aggravated felonies[127] for which they served five years or more in prison.[128] It also is not available to aliens convicted of firearms offenses.[129] An alien convicted of a criminal offense, who was charged with such conviction as a ground of deportability, and whose application for § 212(c) relief has been denied, *will* be deported.[130]

If the Service discovers that an alien was convicted prior to entering the United States, the alien could be charged with being deportable as an alien excludable according to the law existing at time of entry.[131] The alien also will be charged with fraud in obtaining the visa if the alien would not have been eligible to receive a visa if the convictions had been known.[132] A waiver is available for that misrepresentation if the alien is a spouse or parent of a United States citizen or LPR, and *if* the alien is otherwise admissible to the United States.[133] If excludable as a result of the conviction, however, the alien will not be statutorily entitled to the benefits of this waiver because the alien is not otherwise admissible because he or she still would need a § 212(h) waiver. In other words, if an alien needs *two* different waivers to be admissible to the United States, the alien is entitled to neither in a deportation proceeding.[134]

Aliens who become public charges within five years after entry may be deportable if the reasons that resulted in their assuming such a status did not arise after entry.[135] In other words, the alien would not be deportable if he or she can demonstrate that circumstances had changed after entry. Another status that could lead to deportation is if an alien is, or has been, a drug abuser or addict since entering the United States.[136] There is no waiver for such a status.

---

[125] INA § 241(a)(2)(9)(i) (1990), 8 U.S.C. § 1251(a)(2)(9)(i) (1990). Recall the discussion in Waiver of Grounds for Exclusion on the distinction between exceptions and waivers. An alien with only one conviction or who has admitted committing only one act of simple possession of less than 30 grams is *not* deportable—that is, the alien would not be placed in deportation proceedings, because a single conviction or commission of such an act is an *exception* to what is normally a ground of deportability. The same conviction or admission becomes a ground for exclusion, however, if the alien spouse leaves the United States after the conviction and seeks to return to the United States. Upon seeking to reenter, the alien spouse would be placed in exclusion proceedings (if the departure was not brief, casual, and innocent), and the alien would need to seek a § 212(h) waiver; *see infra* text accompanying note 127.

[126] INA § 212(c), 8 U.S.C. § 1182(c) (1990). While the plain language of the statute states that this waiver is only available to aliens who are applying for permission to return to the United States, it has been held to be a denial of equal protection to preclude aliens who have *not* departed the United States from obtaining that waiver. Francis v. INS, 532 F.2d. 268 (2d Cir. 1976). Consequently, if there is an analogous exclusion ground to the charge of deportability pending against the alien, the alien will be able to apply for relief in deportation proceedings. *In re* Garcia, 16 I&N (BIA) 726 (1979).

[127] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1990).

[128] INA § 212(c), 8 U.S.C. § 1182(c) (1990).

[129] *See In re* Hernandez, Interim Decision 3147 (BIA 1992).

[130] *See* INA § 244(e)(1), 8 U.S.C. § 1254(e)(1) (1990). Aliens deportable for these convictions are not eligible for voluntary departure from the United States.

[131] INA § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1990).

[132] *Id.* An example of the charge is as follows:

> § 241(a)(1)(A) of the Act, an alien who at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, an alien who has been convicted of a crime involving moral turpitude, as described in Section 212 (a)(2)(A)(i) of the Act; and an alien who by fraud or willfully misrepresenting a material fact, seek to procure or have procured a visa or entry into the U.S. or other benefit under this Act as described in § 212(a)(6) CC)(i) of the Act.

[133] INA § 241(a)(1)(H)), 8 U.S.C. § 1251(a)(1)(H) (1990). Part of this waiver is similar in substance to the deleted § 241(f) waiver.

[134] INA § 241(a)(1)(H), 8 U.S.C. § 1251(a)(1)(H) (1990); *In re* Roman, 19 I&N (BIA) 855 (1988).

[135] INA § 241(a)(5), 8 U.S.C. § 1251(a)(5) (1990).

[136] INA § 241(a)(2)(9)(ii), 8 U.S.C. § 1251(a)(2)(9)(ii) (1990). The 1990 amendments added the provision relating to drug "abusers." Previously, the government had to prove the addiction of the alien through medical records. Mere users were not deportable. *In re* F-S-C, 8 I&N (BIA) 108 (1958). The amendment appears to make it easier to deport an alien who may not have medical records that would enable the government to prove that the alien was an addict. A "rap sheet" showing frequent arrests for use of drugs could satisfy the requirement that an alien be proven to be a drug "abuser."

Conclusion

This article is not intended to cover all the issues that may arise during the immigration process. It is intended, however, to help the legal assistance officer with "issue spotting," to steer them to the proper section of the law, and to make them aware of recent amendments to the Immigration and Nationality Act. The IMMACT 1990 provides obvious benefits for alien spouses in areas pertaining to obtaining their residence status. However, the potential consequences relating to criminal behavior are very severe. The legal assistance officer should ensure that clients are aware that their activities both outside and inside the United States could effect their immigration status.

Highlights of the Amendments to the Supplementary Agreement

Major Wes Erickson, Legal Liaison Officer,
United States Embassy, Bonn, Germany

Introduction

On 18 March 1993, representatives of the Federal Republic of Germany and each of the six sending states[1] signed several new agreements on the stationing of their armed forces in Germany pursuant to the Supplementary Agreement (SA).[2] The signing of the Agreement to Amend the SA brought to a close the negotiations of the first major modification to the SA since it took effect in 1963. The purpose of this article is not to review the entire SA, as modified, or to expound in detail any particular facet of it. Instead, this discussion will focus on the political forces which brought about the recent review of the SA, examine the processes of it, and highlight the changes that have been made. In addition, the article will assess what effect the amendments portend for the force and its individual members.

History

The SA has been in effect without major change for nearly thirty years.[3] Particular to the Federal Republic of Germany, and widely recognized as the model stationing agreement,[4] the SA is a detailed agreement that expands on the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA).[5] Several administrative agreements further supple-

[1] Belgium, Canada, France, the Netherlands, the United Kingdom, and the United States are the sending states that station troops on the territory of the Federal Republic of Germany [hereinafter Germany or the Federal Republic].

[2] At the time this article was written, none of these documents had been officially published and cannot be formally cited. The main agreement, Agreement to Amend the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971 and 18 May 1981, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany [hereinafter Agreement to Amend the SA], upon entry into force, as its title suggests, will amend the Agreement to Supplement the Agreement between the parties to the North Atlantic Treaty regarding the status of their forces with respect to foreign forces stationed in the Federal Republic of Germany, with protocol of signature, August 3, 1959, U.S.T. 531, 481 U.N.T.S. 262 [hereinafter SA, and Protocol]. Both of these agreements are site specific to Germany and supplement the Agreement between the parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA], which applies in the territory of all signatory states. The other agreements concluded pursuant to the Agreement to Amend the SA will be discussed later. *See infra* notes 24-27, 43, 106.

[3] Both the NATO SOFA and the SA entered into force for the Federal Republic of Germany on July 1, 1963. BUNDESGESETZBLATT [BGBl] II S. 745 (F.R.G. 1963). The Agreement to Amend the SA will enter into force 30 days after the deposit of the last instrument of approval or ratification of the signatory states, most likely to occur sometimes in early 1994 according to current forecasts. *See* Agreement to Amend the SA, *supra* note 2, art. 52.

[4] Not only have other stationing agreements been based on the NATO SOFA and SA, future negotiations or renegotiations of existing stationing arrangements undoubtedly will look to what occurred in this review for guidance.

[5] The SA's 83 articles and Protocol touch aspects ranging from security of installations to registration of vehicles, employment of local nationals to the death penalty, and postal and telecommunications services to movement of weapons and machinery over public roads.

ment the SA.[6] Taken together, these agreements detail and prescribe a variety of sending state activities in the Federal Republic, and grant assorted rights and privileges, many of which are significant concessions beyond what the NATO SOFA requires. Many of these agreements were negotiated at the time when the Federal Republic of Germany recently had emerged from the Allied Occupation and was becoming an integrated member of NATO, but at the same time consented to the continued stationing and presence of foreign forces on its territory.[7]

As the Federal Republic has evolved over the years, many Germans have questioned the legitimacy of the stationing agreements in a sovereign state.[8] In recent years, the debate over stationing has reached even the highest levels of government. Perhaps the most significant development is called the *"Gross Anfrage"*[9] (the "Big Question"). On 9 March 1989, the Social Democrat (SPD) faction in the Federal Parliament (*Bundestag*), by means of a parliamentary interpellation, challenged the German government to explain how it would effect "Equal Partnership in the Alliance" in the future. The SPD called on the German government to examine which rights and privileges granted to foreign forces no longer were consistent with the Federal Republic's status as an equal partner in NATO and to eliminate them. Some of the questions foreshadowed the important concerns raised during the SA review. For example:

> Have foreign troops stationed on the territory of the Federal Republic carried out or prepared missions for targets and purposes that were not covered by the North Atlantic Treaty, the Treaty on Germany, and the Presence Treaty?
>
> Do agreements or other regulations exist in any NATO member states that are comparable to the SA to the NATO SOFA as it applies to the Federal Republic of Germany?
>
> Did foreign troops in the past always meet their obligations under Article 45 to notify the German authorities at the earliest possible date of their programs of maneuvers and other training exercises?
>
> Have agreements been concluded pursuant to Article 46 regarding areas that may be flown over at altitudes lower than otherwise permissible?
>
> Does the Federal Republic share the opinion expressed in legal literature that, according to the Basic Law, the federal government may not tolerate on its territory the pronouncement of death sentences by military courts of the sending states?
>
> Is the federal government of the opinion that private vehicle owners are obliged to present their vehicles for regular safety checks as required by German law? If not, does the federal government deem a change

---

[6] *See, e.g.*, Agreement to Implement Paragraph 5 of Article 45 of the Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (concerning notification of maneuvers and training exercises); Administrative Agreement to Article 60 of the Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (detailing particulars of telecommunications services); Agreement on the Implementation of the Customs and Consumer Tax Provisions of the Supplementary Agreement to the NATO Status of Forces Agreement in Favor of Members of a Force, of a Civilian Component and Dependents (article 66 and paragraph 6 of Article 3 of the Supplementary Agreement); United States/German Administrative Agreement on Aerial Photography; United States/German Administrative Agreement Pursuant to Paragraph 3 of Article 74 of the Supplementary Agreement (dealing with preventing the abuse of rationing, customs, and tax privileges particularly in hiring practices); construction of facilities agreements (ABG-75 agreements); a 1984 agreement concerning the Acquisition and Possession of Privately-Owned Weapons by Personnel of the Armed Forces of the United States in the Federal Republic of Germany; a 1991 Arrangement on the Joint Use of Military Training Areas in the Federal Republic of Germany which are under Bundeswehr or United States Army administration.

[7] *See* Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany (the Paris Protocol of 1954), October 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425; Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany, signed at Paris, October 23, 1954, 6 U.S.T. 5707, T.I.A.S. No. 3428; Convention on the Presence of Foreign Forces in the Federal Republic of Germany (Presence Convention), October 23, 1954, 6 U.S.T. 5689, T.I.A.S. No. 3426.

[8] *See, e.g.*, Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics,* 122 MIL. L. REV. 77 (1988) (an excellent pre-1988 review of the issues raised by the stationing agreements and their impact on German sovereignty). As a point of interest, the author of that article deemed the likelihood of a renegotiation of the SA as "almost nonexistent." *Id.* at 108 n.93, 115. This assessment was based partially on a West German milieu predating Germany's unification, which no one could have predicted to have been realized so quickly; *see also* Schroeder, *Sonderfall Deutschland,* DIE ZEIT, Nr. 42 (14 Oct. 1988) (pointing out that the Federal Republic as a result of the Presence Convention does not really have full sovereignty); Feeney & Murphy, *JAGC History Update,* 122 MIL. L. REV. 67-69 (1988) (reviewing several German court actions where United States privileges and immunities under the SA and NATO SOFA did not fare well).

[9] *Grosse Anfrage—Gleichberechtigte Partnerschaft im Buendnis* [The Big Question—Having Equal Partnership in the Agreement], DEUTSCHER BUNDESTAG, 11 Wahlperiode, Drucksache 4158. Through this parliamentarian inquiry, the Social Democrats (SPD) posed over one hundred particular, pointed, and often rhetorical questions. My subsequent quoting of some of these questions derives from the English translation of the inquiry that the United States Embassy, Bonn, transmitted to USAREUR, among others, in a March 22, 1989 unclassified message.

of the SA necessary in view of the obvious safety deficiencies of many private vehicles owned by members of the forces, their civilian components, and their dependents?

Is a reduction of jobs held by Germans in favor of sending states' nationals to be expected?

Many other questions were asked, ranging from the environment to civilian labor laws and public safety to identification papers.

The German government asked for, and received, help from Headquarters, United States Army, Europe (USAREUR) to respond to these questions. Headquarters, United States Army, Europe, responded with twenty-eight written pages.[10] On 30 May 1990, after holding hearings in the summer of 1989, and before the German government had responded, the SPD faction in the *Bundestag* passed a resolution pertaining to the *Grosse Anfrage*. Noting that the unification of Germany would occur in the not-too-distant future and observing the stunning developments brought on by Mikhail Gorbachev in eastern Europe, the SPD declared that the legal basis for stationing foreign troops in the Federal Republic should be viewed in a new light. The SPD demanded of the German government that the Federal Republic become a full and equal NATO partner and that it take steps to abolish unjustified privileges of the other NATO partners. It further declared that to "respect" German law means to "follow" German law. Its other areas of concern were: the death penalty; the general waiver of criminal jurisdiction; the closure of unneeded accommodations; the provision of civilian employment rights equivalent to what the *Bundeswehr* (the Army) grants its civilian employees; the conduct of maneuvers only according to German law; and the employment or deployment of stationed forces only to fulfill NATO goals and purposes.[11]

The *Grosse Anfrage* was an SPD initiative. Not all other political parties and individuals felt as strongly as the SPD that Germany still was subject to laws imposed by the occupation powers, that it afforded its guests far too much leeway, or that it lacked in sovereignty.[12] The unification of Germany necessitated a review of the various agreements concluded to end the occupational regime. Once again the allies had to address the issue of stationing foreign troops in the Federal Republic. The Note on the Extension of the Presence of Foreign Forces Convention provided the legal basis for the continued stationing of forces in the Federal Republic.[13] The unification of Germany on 3 October 1990 made a review of the SA almost inevitable, something that a few years earlier was unimaginable.[14]

Along with the unification of Germany, came the assurance of a Soviet withdrawal of troops from the eastern *Laender* (states/territory), phased over four years, and a reduction in the number of German troops to a ceiling of 370,000.[15] In the interim, a stationing agreement defines the rights and privileges of the Soviet stationed troops.[16] With the further collapse of the Warsaw Pact, 1991 turned into a year of great optimism. The vanishing threat to the east led to the reassessment of the need for, and future role of, NATO—a continuing process that runs unabated even today. At the same time, western allies made unilateral decisions to reduce significantly the number of troops they station in Europe. These figures have continued to be adjusted, but as of February 1993, the

---

[10] Memorandum, CINCUSAREUR Liaison Officer (22 June 1989). A copy of this memorandum is maintained in the USAREUR Legal Liaison's files in the United States Embassy, Bonn.

[11] *Entschliessungsantrag der Fraktion der SPD zur Grossen Anfrage* [The SPD's Proposal on the Big Question], DEUTSCHER BUNDESTAG, 11 Wahlperiode, Drucksache 7292. The federal government never did respond formally to the *Grosse Anfrage*.

[12] *See, e.g.*, Kraatz, *The NATO Status of Forces Agreement and the Supplementary Agreement,* ARMY LAW., Nov. 1989, at 3 (concluding that the stationing agreements do not give the sending states rights incompatible with German sovereignty). Significantly for the sending states, Kraatz was the chief negotiator for the German Ministry of Defense in the negotiation of the bilateral administrative agreements concerning training areas. *See infra* note 43.

[13] 30 I.L.M. 417 (1991). On September 25, 1990, the Federal Republic and the six sending states exchanged Notes extending the force of the Presence Convention after German unity, but only to the territory that it originally covered.

[14] See Exchange of Notes Concerning the Agreements Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 30 I.L.M. 415 (1991). This exchange of Notes on September 25, 1990, just one week before unification, extended the force of the NATO SOFA and SA after German unity, and strongly hinted that a request for the review of the SA would be forthcoming. Making reference to Article 82(c) (ii) of the SA, the German Note recites that "any Party may request a review" of the SA, and that such review should take place within three months after the request is submitted. The citation of this provision suggests that the Germans considered some provisions of the SA to be especially burdensome or not reasonably to be expected to apply to them. The Note indicates that the Parties are studying the matter, "bearing in mind the developments in Europe and in Germany, notably [force reductions] and the attainment of German unity;" *see also supra* note 8 (contrast the change in outlook from just a few years earlier).

[15] Treaty on the Final Settlement with Respect to Germany, art. 3(2), Sept. 12, 1990, 29 I.L.M. 1186 (1990).

[16] *Vertrag zwischen der Bundesrepublik Deutschland und der Union der Sozialistischen Sowjetrepubliken ueber die Bedingungen des befristeten Aufenthalts und die Modalitaeten des planmaessigen Abzugs der sowjetischen Truppen aus dem Gebiet der Bundesrepublik Deutschland,* [Agreement Between the Federal Republic of Germany and the Soviet Union over the Conditions of the Planned Withdrawal of Soviet Troops from the Federal Republic of Germany] Oct. 12, 1990, Bulletin of the German Government Press and Information Office, No. 123/5. 1281, Oct. 17, 1990.

United States, both the executive and legislative branches, seemed to have settled on 100,000 troops for Europe[17] Along with a New World Order,[18] it was only natural for the Germans to want a *"neue Ordnung,"* particularly as to the stationing of troops on their territory.

Negotiations

The Federal Republic requested a review of the SA in June 1991. The request did not surprise any of the sending states. Following some preparatory consultations, the SA review kicked off with a plenary session on September 5, 1991. Working groups began to meet in October. The working groups eventually evolved into drafting and then editing groups. Further plenaries were held to review and provide additional direction to the working groups. In October of 1991, the optimistic participants forecast a completion of the review by April 1992.

From the first plenary session, it was clear that the German delegation approached the "review" with the idea of "revision" firmly in mind. Citing the external and internal changes in the Federal Republic—in particular the dissolution of the Warsaw Pact—the reduction of foreign troop levels in the Federal Republic,[19] and the termination of four-power responsibility with the unification of Germany, the Germans pressed for the SA review to reflect these changed circumstances. In the thirty years that had passed, circumstances clearly had changed; the Germans' goal was to adapt the SA to these changed circumstances. Their focus was to scour the whole document and perfect it. Politically, they wanted a "new" agreement to reflect a "new" reality. In keeping with this approach, they came up with a long list of specific changes they would seek in the text of the revised SA. The *Laender*, which had commented on nearly all eighty-two substantive articles of the SA in response to the Foreign Office's inquiry in preparation for the negotiations, pushed this detailed, article-by-article approach. The Federal Ministry of Defense, in contrast, was content to maintain its excellent working relationship with the sending states and have the talks conclude with interpretive statements.

The United States—with the backing of the other sending states—wanted the review to focus on a few problem areas, which could then be discussed in a constructive, pragmatic approach, and then to determine what legal shape the "fix" would take. Although this method would not necessarily favor interpretive statements instead of amendments to the SA, it was clear that the United States was willing to continue to live with a system that, along with a good working relationship, had served them well for many years. The sending states hoped that this strategy would lead to a swift, yet productive, conclusion to the review.

The sending states could not convince the Germans to abandon their perceived need for a revised agreement. They continually urged the Germans to focus on the real problem areas, lest the review go on in a never-ending search for perfection. The Germans narrowed their focus somewhat by proposing a basket (or subject) approach, but this still was not a case-by-case approach to concrete problems; the Germans continued to propose textual changes rather than to broach problems that sorely needed solutions. The designation of six baskets—Training and Maneuvers, Accommodations, Transportation and Traffic, Legal Issues (including Labor) Concluding Provisions, and Miscellaneous (including Environment)—served as an organizational means of getting the right people together in working groups to resolve issues.

Along with the strategy of changing the appearance of an old document to reflect new realities through a massive overhaul of its language, the Germans had two main objectives. First, they wanted German law and regulations to apply to the

---

[17] THE STARS AND STRIPES, Feb. 5, 1993, at 1-2. Although the Bush Administration had set a figure of 150,000 United States Troops in Europe, Congress set a goal of 100,000 by October 1, 1995. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, sect. 1303 (amending subsection (c)(1) of section 1002 of the National Defense Authorization Act for Fiscal Year 1985 (22 U.S.C. 1928 note)). The Clinton Administration has settled for now on a total of 1.4 million United States troops in 1997, 100,000 of them to be stationed in Europe. This probably will result in about 60,000 Army personnel in Germany, which makes one wonder if the United States can even man a full corps in the Federal Republic. An article in *The Stars and Stripes,* March 13, 1993, at page 7, reported that General Sullivan, the Army Chief of Staff, told the House Armed Services military personnel subcommittee that each of the Army's two German-based divisions would be reconfigured with a "round-out brigade" stationed in the United States. Under two cooperative arrangements made final in April 1993, the United States Fifth Corps will gain the 5th German Armored Division, and the Second German Corps in Ulm will gain the United States First Armored Division, both to be under NATO command. The other sending states also are making deep cuts and realignments. Canada plans to pull out completely by the end of 1993. Belgium and the Netherlands will keep token numbers in Germany. France, by 1994, will reduce more than half of its force, to about 20,000. The United Kingdom is reducing to around 27,000.

[18] Of course the world is in anything but in a state of order. Volatile, unpredictable, and dangerous threats, scattered and ubiquitous, have replaced the menace of an overwhelming communist adversary. The January 4, 1993 issue of *Newsweek* contained a picture essay entitled "Hate thy Neighbor," in which Serbian "ethnic cleansing," German militant neo-Nazism, and Kurdish infighting were featured prominently. A follow-on article describes 1992 as "A Fratricidal Year." The next article, at page 29, mentions "national" self-determination as a plague of the next century, about which Senator Daniel P. Moynihan is writing a book with the catchy title "Pandemonium" (the capital of hell in Milton's *Paradise Lost*).

[19] The Germans would not accept the argument that in light of the withdrawal of troops (which was proceeding apace) it would make sense to postpone the review until it was reasonably clear what kind of presence would remain in Germany. The irony is that by proceeding so fast, a good deal of effort has been expended to account for the presence of troop levels that may not even be here to reap the benefits, and the danger is the results may not be suited to, or necessary for, a small force. It is not inconceivable that the Germans may want to try again in a few years to get it right. Of course, they still have the right under Article 82 of the SA to request such a review.

status and activities of sending state forces, such as vehicle standards, the carrying out of the death penalty, and environmental standards. Second, they sought to bring the operations of sending state forces into an equivalent relationship with those of the *Bundeswehr*; in other words, to subject sending state forces to the same stringent requirements to conduct training and to require that they give German nationals the same labor rights. A guiding consideration was how German forces were treated in the sending states.[20] Basically, the review of the SA can be viewed as a German reassertion of sovereignty. Certainly the main principle for the Federal Republic was to ensure respect for German law, which for them meant "application of" for the most part.

The sending states were willing to accommodate the Federal Republic's legitimate needs where possible. While unable to state authoritatively what the other sending states' main objectives in the review were, the other sending states were not adverse to the United States objectives, were almost always supportive of the United States positions, and cooperated closely with the United States throughout the review. In preparation for the SA review, USAREUR developed three guiding principles:

1. Retain the ability to train and not to impair the defense mission;

2. Maintain the quality of life for the soldiers and their dependents; and

3. Prevent the significant increase of costs.

These principles were adopted by European Command (EUCOM) and the Embassy in Bonn, thereby becoming the United States guiding principles. While taking a constructive attitude toward the review, the United States commitment to these principles never wavered.

The length of the negotiations surpassed what either the Germans or sending states foresaw. All expected—and desired for political reasons—that the review would last only six or seven months. The working groups—in which experts would discuss issues and solutions—were active from October 1991 to May 1992. Plenaries occurred about every two months until July 1992. At a typical plenary, the Federal Republic would have at least one representative from each of the involved *Laender* and federal ministries. The United States delegation, headed by Special Ambassador Nelson Ledsky, usually was comprised of representatives from the State Department, the Department of Defense, the Embassy in Bonn, EUCOM, USAREUR, and USAFE. The other sending states were similarly, but not usually as fully, configured. It was not unusual to have fifty to sixty persons at a plenary.

The working groups and plenaries accomplished eighty percent, if not more, of the substantive work during the first nine months of negotiations. From that point on the progress was slow because the remaining issues could only be resolved at the political level.[21] Most of the remaining issues were heavily United States concerns. After then-acting Secretary of State Eagleburger and Foreign Minister Kinkel designated Ambassador Kimmitt and State Secretary Lautenschlager to resolve the final sticking points—which they did—the other sending states supported the compromise.[22] January 15, 1993 was set to initial the Agreement to Amend the SA to signify the end of negotiations. This unusual step highlighted to the German people that progress had been made.[23] All that remained was editorial work to purge the documents of errors and get them ready for signature.

The Agreement to Amend the SA was in some ways an extensive revision of the SA, a document that had remained relatively static for three decades. Twenty-nine of eighty-three articles were amended. Five articles were deleted while five new articles were added. Seven sections of the Protocol were amended and five new sections were added. Additionally, all the sending states signed two multilateral administrative agreements,[24] and five signed at least one bilateral administra-

---

[20] The Germans wanted their forces in the sending states to be treated the same way that sending state forces were treated in the Federal Republic. From a United States perspective, this ignores the vital differences of stationed forces in Germany which have had a real operational mission, and are only a portion of a vast military force deployed throughout the world with which they must remain compatible. In contrast, the German forces in the United States are not deployed, but are merely there for training. Other sending states that have German troops in their territories may not treat them in the same manner as the United States treats them. To equalize all these situations would be quite an undertaking, and ultimately was not done. *See infra* discussion on reciprocity.

[21] At least from July until October 1992, it seemed that the negotiations languished. Part of this delay may have resulted from the Supplementary Agreement review not being a top priority of the Foreign Office compared to more pressing issues such as Yugoslavia, Maastricht, German-Franco Corps, and asylum problems. The summer vacation and the turnover of personnel also contributed. The Federal Ministry of Defense, however, was busy negotiating eleven administrative agreements on training areas with five sending states. *See infra* note 43.

[22] In September 1992, Foreign Minister Kinkel sent letters to the other sending state foreign ministers asking for their cooperation and help in the SA review. The United States reply in October—supported in a show of unity by the other sending states' replies—coincided with Secretary of Defense Cheney's visit to Bonn to meet with Defense Minister Ruehe and Foreign Minister Kinkel. The letter suggested that Ambassador Kimmitt meet with State Secretary Lautenschlager to resolve the outstanding issues. The remaining issues were reciprocity, administrative agreements on training areas, environmental costs, vehicle safety standards, codetermination, and proportionality. The meeting took place on November 10, 1992 and resolved in principle all of the outstanding issues except labor. The other sending states responded positively to the results obtained.

[23] The initialling took place two days after the Federal Republic's Cabinet considered the contents of the Agreement to Amend the SA, which it approved with the understanding that further substantive changes would not be made.

[24] *See infra* notes 27, 106.

tive agreement.[25] Moreover, several side letters were exchanged.[26] Yet the Agreement to Amend the SA is only thirty-seven pages long, and genuinely new language probably would fit on to less than ten pages. Its magnitude becomes a matter of perspective. From a German point of view, that extensive a revision may not have taken place. Alternatively, sending states may see the revisions as more than mere tinkering. If at the end of negotiations, both sides go away grumbling that everything is not just quite right, such a reaction signals that a good and balanced agreement has been achieved—one that will not need immediate revision. The Agreement to Amend the SA may fit this model.

Training

The working group responsible for Basket One—covering the right to train, maneuver, and fly outside an accommodation—was the first to meet. Training is the essence of what the sending states' forces must do in the Federal Republic of Germany to remain effective. Hindering a state's capacity to train reduces its proficiency and ability to perform its mission. On the other hand, the Federal Republic does not want to be seen as a giant training ground for other states, especially for foreign troops stationed elsewhere. With the tension generated by these considerations, the parties extensively revised Article 45 (land maneuvers)—two paragraphs replace all the current language. Article 46 (air maneuvers) received a similar revision. Additionally, the parties concluded a new agreement implementing Article 45.[27]

The new Article 45 preserves a force's right to train outside an accommodation if necessary to accomplish its defense mission, but explicitly requires that the training be subject to German approval. The Germans undoubtedly will view this right as stemming from their approval, while the sending states will see the right as flowing from their presence in the Federal Republic, with the approval being a check on the right. Both viewpoints can be supported depending on whether the German or English translation is relied on.[28] The Federal Minister of Defense is the approval authority for these training exercises, charged to give "due consideration" to the applicable agreements between the Federal Republic and the sending state involved as well as the training requirements laid down by competent military authorities such as SACEUR or NATO.[29]

The participation of elements of forces not stationed in the Federal Republic of Germany also requires approval from German authorities, which may be the Chancellery, the Foreign Office, or the *Laender* authorities. In any event, the Federal Minister of Defense will run point for the sending states in gaining the approvals required by Article 45(1) because the Article 45 Agreement—which outlines a complex and comprehensive set of procedures for notification, coordination, and authorization of maneuvers and training exercises—has assumed this burden.[30] An exception to the requirement for approval of units outside of the Federal Republic, is the entry into the Federal Republic of the United States element of the NATO ACE Mobile Force (Land), which automatically is approved.[31]

The new Article 46 covers air maneuvers in a similar fashion. Approval of the competent German authorities is required, as is "due consideration" on their part. Both Article 45 and Article 46 express that German law and regulations, respectively, shall govern the conduct of maneuvers and train-

---

[25] *See infra* note 43.

[26] Each of the sending states exchanged letters with the Federal Republic to resolve the issues of proportionality (the concept of retaining German civilian workers in some relation to a force's own civilian component, which the sending states resisted) and reciprocity (the equivalent treatment of German soldiers in a sending state as sending state troops receive in Germany, which the sending states opposed). *See supra* notes 20, 22; *infra* notes 97, 110. Additionally, the United States exchanged letters on the NATO ACE Mobile Force, drivers' licenses, and property. *See infra* notes 31, 62, 109, respectively.

[27] Agreement to Implement Paragraph 1 of Article 45 of the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany [hereinafter Article 45 Agreement]. The Dutch fought for, and won, the concession that this agreement would have the status of a (Vienna) treaty instead of an administrative agreement. This has the effect of making modifications to the agreement more difficult, which runs counter to the flexibility the Germans sought.

[28] The phrase "[A force] shall on the basis of this Article, subject to the approval of the Federal Minister of Defense, have the right to conduct . . . ." suggests, by the use of the parenthetical clause, a slightly different emphasis on the right than the German phrase "[Eine Truppe hat] auf der Grundlage dieses Artikels vorbehaltlich der Zustimmung des Bundesministers der Verteidigung das Recht . . . durchzufuehren," which slightly emphasizes the reservation. Agreement to Amend the SA, *supra* note 2, art. 22 (replacing Article 45(1) of the SA).

[29] *Id.*

[30] Article 45 Agreement, *supra* note 27, arts. 2, 8, 9.

[31] The NATO ACE Mobile Force (Land) has elements stationed in Italy that periodically come to Germany for training. Headquarters, United States Army, Europe, concerned that the approval of entry of elements of this force into the Federal Republic in accordance with the new Article 53, paragraph 2*bis* should not be subject to any machinations, sought special assurances in a letter. *See infra* note 41. The German Federal Ministry of Defense's response permits the entry of up to 1200 troops four times a year. Headquarters, United States Army, Europe, OJA maintains these letters.

ing exercises. Competent German authorities should discuss prospective changes in any law or regulation that might impair training with the authorities of the sending states.[32]

Accommodations

Under the current SA, in the public safety and order arena, a sending state can apply its own regulations if it establishes equal or higher standards than those contained in German law. Whether German law applies in other areas is not stated clearly.[33] The Agreement to Amend the SA explicitly states that "German law shall apply to the use of . . . [an exclusive use] accommodation,"[34] but this is not an absolute application; it is tempered in at least three ways.

First, a sending State still has the right to take the measures necessary to fulfill its defense responsibilities.[35] This leaves room for extensive interpretation. One could argue that if the *Bundeswehr* is exempt or given lax treatment, then a sending state force should receive the same consideration. Of special importance, "national training standards" is, by definition, included within the concept of "defense responsibilities" for which all measures may be taken.[36]

Second, the SA limits the application of German law as well as other international agreements.[37] Third, an exception exists for the "internal sphere," which is a new concept and a field from which to harvest numerous interpretations. Replacing the comparison of German and sending state regulations, the "internal sphere" pertains to the "organization, internal functioning, and management of the force and its civilian component, the members thereof and their dependents, and other internal matters which have no foreseeable effect on the rights of third parties or on adjoining communities or on the general public."[38] Because the limits of the "internal sphere" and how German law will interact with the fulfillment of defense responsibilities are unclear, one should expect differences to arise in the future which will have to be resolved on a case-by-case basis.[39] Sending state and German authorities are encouraged to consult and cooperate to resolve these differences.[40]

The use of major training areas, local training areas, and local firing ranges receives particular attention in the Agreement to Amend the SA. Units stationed outside the Federal Republic of Germany only may use these facilities after prior notification to German authorities and if those authorities do not object within forty-five days.[41] More importantly, at the insistence of the Germans, administrative agreements covering these training areas—as well as bombing ranges—will regulate the details of their use.[42] These bilateral agreements—among the last things to be resolved in the review process—regulate firing hours, noise levels, and safety measures. Nevertheless, the United States Army feels that it has preserved its ability to train, even at night, while making concessions to the local populaces on noise and the duration of firing. The various agreements have a similar pattern; the dif-

---

[32] Agreement to Amend the SA, *supra* note 2, art. 22, para. 2; art. 23, para. 2.

[33] *Id. supra* note 2, art. 53, para. 1.

[34] *Id. supra* note 2, art. 27.

[35] *Id. supra* note 2, art. 27, para. 1.

[36] *Id. supra* note 2, art. 28, para. 1 (adding a new paragraph to the Protocol of Signature reference Article 53).

[37] *Id. supra* note 2, art. 27, para. 1.

[38] *Id.*

[39] Something seemingly as innocuous as the business hours of Army and Air Force Exchange Services, which at first blush should be deemed to be within the internal functioning and management of a sending state force, may give rise to claims that late or early hours affect third parties or communities because of the noise or added traffic at—by German standards—unusual hours. Whether the matter is within the internal sphere or the outer sphere—in which German law applies—is unclear; a gray area may result for which a decision (compromise) will have to be made on which law to apply. During the negotiations, the United States took pains to ensure that German law would not apply to how the force runs its schools (curriculum and teaching standards), disciplines its troops, and practices medicine on its soldiers, civilian component, and family members. The Germans seemed to accept this position. Article 30 of the Agreement to Amend the SA (revising Article 54, paragraph 1 of the SA), grants the sending states an expanded internal sphere for inoculations and disease prevention measures, allowing the sending states to use their own methods as long as they do not endanger public health.

[40] Agreement to Amend the SA, *supra* note 2, art. 27, para. 1. This reference alludes to the new Article 80A on dispute resolution mechanisms, which applies to many situations that may arise. *See id. supra* note 2, art. 50.

[41] *Id. supra* note 2, art. 27, para. 2 (adding Article 53, para. 2*bis*).

[42] *Id. supra* note 2, art. 27, para. 3. (adding Article 53, para. 2*ter*). One key phrase in this paragraph confines the obligation to make such agreements only to those worked out "at the national level." Thus, the sending states are spared the need to negotiate with whatever capricious local politician of a domain near a training installation should demand. The United States and United Kingdom sought the word "may," but the Germans insisted on "shall" to the need to make agreements to regulate details of the use of training areas. The addition of the phrase "at the national level" during the meeting between Ambassador Kimmitt and State Secretary Lautenschlager helped to break the impasse. *See supra* note 22.

ferences stem from consideration of strong local concerns, the particular mission of the training area, and the preferences of the sending state.[43]

A new Article 53A introduces a new concept to the SA—permits. It requires German authorities—to the extent that German law applies under Article 53—in cooperation and after consultation with sending state authorities, to shoulder the burden of completing administrative and legal procedures pertaining to use of accommodation not within the "internal sphere," and for which German law requires special licenses, permits, or permission.[44] Although no guarantee is given that the proper permit or permission will result, sending state representatives will not have to navigate through the German bureaucracy. In addition, and along the same vein, the German federal authorities must act to defend the interests of a sending state force if any aspect of the permitting process is legally contested. If it loses that battle, it then must consult to develop alternative means of meeting the force's needs within the framework of German law.[45]

Environment

Although lumped into Basket 6 (Miscellaneous), environmental issues were anything but incidental in the review process. Indeed, extremely tough negotiations over environmental concerns occurred not only in the main agreement, but also in the subordinate administrative agreements. Perhaps the reason "environment" did not have its own basket is its ubiquitous nature—its impact shows up on accommodations, in training, and the costs of maintaining a force in the Federal Republic.

The United States commitment to maintaining the environment in the Federal Republic of Germany is longstanding and comprehensive.[46] The new Article 54A—a greatly truncated version of what the Germans originally proposed—will not demand much adjustment on the part of the United States. The first paragraph is a declaration that the sending states "acknowledge the importance of environmental protection in . . . all the activities of their forces." The second paragraph requires sending states "without prejudice to the respect for and application of German law," in essence to review the environmental impact of significant projects with a view towards avoiding detrimental environmental impacts. Negative environmental impacts are not forbidden, but if they must occur, they should be offset by "restorative or balancing measures." The sending states may ask for German assistance when these measures are needed.[47]

The new Article 54B requires sending states to use "fuels, lubricants, and additives" that are consistent with German environmental regulations, but with an escape clause "insofar as such use is compatible with the technical requirements of [their] aircraft, vessels, and motor vehicles." The sending states also must observe German rules and regulations on noise and emissions but with several limitations. First, they apply only to "passenger and utility motor vehicles;" aircraft and military vehicles in an expansive sense are not included. Second, the phrases "especially in the case of new vehicles" and "to the extent this is not excessively burdensome" should imply that older vehicles will not have to meet the standards as strictly as new vehicles, and that existing vehicles, vessels, and aircraft will not have to be reconfigured or redesigned to meet the requirements. Third, no direct inspection for compliance exists. Instead, it is envisioned that the competent German authorities and sending state authorities, through consultation and cooperation, will be able to apply and to oversee these provisions.[48]

---

[43] The United States signed a Major Training Area (MTA) Agreement covering Grafenwoehr, Hohenfels, and Wildflecken; a Local Training Area (LTA) Agreement designed to encompass all other training areas; and an agreement covering the use of the Siegenburg bombing range. The United Kingdom signed three similar agreements. The Netherlands and France each signed a local training area agreement. Belgium signed one agreement covering all its training areas. The sending states coordinated its efforts in negotiating these agreements. While the exact same language is not used in every agreement, the language is similar, particularly in the United States and United Kingdom agreements. The Germans sought and obtained a German Military Representative (GMR) who will act in an advisory capacity to the training area commanders to ensure that German military interests are considered. As an example of the detail of these agreements, the United States Army's MTA as to Grafenwoehr prohibits live firing of artillery and large-caliber weapons 20 mm and greater on Sundays and the eighteen German holidays listed in an annex. Additionally, on weekdays (including Saturday when firing must end at 1400 hours) firing may not begin before 0800 hours and must end as follows:

1 November through 31 January	-	2300 hours
1 February through 31 March	-	2400 hours
1 April through 30 April	-	0100 hours
1 May through 31 July	-	0200 hours
1 August through 31 August	-	0130 hours
1 September through 31 October	-	2400 hours

[44] Agreement to Amend the SA, *supra* note 2, art. 29.

[45] *Id. supra* note 2, art. 29, para. 2.

[46] *See* Exec. Order No. 12,088 (Oct. 13, 1978), *reprinted as amended in* 42 U.S.C. § 4321 (1988); Exec. Order No. 12,114 (Jan. 4, 1979), *reprinted in* 42 U.S.C. § 4321 (1988); 32 C.F.R. § 187; DOD Dir. 6050.7. These all require that the military abroad take consideration of the environmental effects of its actions.

[47] Agreement to Amend the SA, *supra* note 2, art. 31.

[48] *Id. supra* note 2, art. 32.

The issue of who pays the costs of preventing and remedying environmental damage was a thorny point of contention throughout the negotiations, not only as to the principle of who pays, but also, in the case of remediation, the need to have the expenditure be subject to the availability of funds.[49] As to prevention, the sending states will shoulder the "running costs of necessary measures within an accommodation to prevent physical environmental damage."[50] This formulation permits a force to avoid paying to prevent other than "physical" damage—such as noise emissions—and to judge for itself what measures are necessary. As to remediation, the sending state will bear the costs under German law of assessing, evaluating, and remedying "hazardous substance contamination caused by it and that exceeds then-applicable legal standards".[51] This language suggests several key points. German standards apply to the accommodation as have been described in Article 53. The United States, at least, already applies German law or a higher standard in assessing, evaluating, and remedying environmental damage. Significantly, not every environmental damage is covered. "Hazardous substance contamination" is intended to be a tighter construction than "environmental damage." Moreover, the sending state only is responsible if it caused the damage—which is crucial for the sending states—and sidesteps the German legal concept of *Altlasten* whereby the possessor of land may be responsible regardless of whether he or she caused the damage. The manner by which environmental damage claims are settled has not changed. They will continue to be assessed as a damage claim[52] or in a residual value equation.[53] The words "then-applicable" were added at the insistence of the United States to cut off future reassessments of claims if German law subsequently became stricter. Finally, also at the insistence of the United States, the obligation to pay is subject to the availability of funds.[54] As in many other provisions, consultation to resolve differences as to the applicability of these provisions to particular costs is envisioned.[55]

Transportation

The issues in Basket 3 concerned border crossings, movements within and over the Federal Republic, and observance of transportation regulations, vehicle registrations, and driving licenses. The Germans' goal was to take all the relevant articles of the SA and put a stamp of German law, regulation, or authority on them to show that they control their territory and airspace. Therefore, the right of a force, a civilian component, and its members and dependents to enter the Federal Republic and move within its borders in vehicles, vessels, and aircraft is subject to German approval. The sending states did not want the changes to eviscerate the years of practice and procedures that had developed. Consequently, movements and transports within the scope of German law and international agreements are deemed approved, so exercises approved under Article 45 would not require additional approval. If permits or exemptions for transporting hazardous material are required, the sending state can expect that the German Armed Forces will apply for them, in addition to the other coordination of traffic movements that they will perform, on behalf of the sending state.[56]

The amended Article 57(3) requires the force, civilian component, and members and dependents to "observe German traffic regulations" and permits deviations from it only in accordance with German law, unless otherwise provided in the SA.[57] In amended Article 57(5), the sending states agree to "observe basic German transportation safety regulations." The current language has "subject to due regard" and the Germans really wanted "obey," or "comply with." Of particular importance to Canada and the United States—because of the staggering cost implications of complying with German standards—a sending state nevertheless still can apply its "own standards to the design, construction and equipment of vehicles, trailers, inland water vessels or aircraft."[58] The contracting parties wrestled repeatedly with this paragraph up through

---

[49] This issue was settled during the meeting between Ambassador Kimmitt and State Secretary Lautenschlager in which they agreed that the obligation to pay for environmental clean up, as they narrowly defined it, would be subject to the availability of funds. This satisfied the United States concerns with the Anti-deficiency Act complications. *See supra* note 22.

[50] Agreement to Amend the SA, *supra* note 2, art. 41, para. 2 (reference Article 63, para. 8*bis*(a)).

[51] *Id.* (reference Article 63, para. 8*bis*(b)).

[52] *Id. supra* note 2, art. 41; NATO SOFA, *supra* note 2, art. VIII.

[53] Agreement to Amend the SA, *supra* note 2, art. 52.

[54] *Id. supra* note 2, art. 41, para. 2 (reference Article 63, para. 8*bis*(b)).

[55] *Id.* (reference Article 63, para. 8*bis*(c)).

[56] *Id. supra* note 2, art. 38, para. 1. The *Denkschrift* [memorandum] will have to memorialize that a "movement by road" means a movement of oversized vehicles or movement of more than 30 vehicles of normal dimension and weight, and that a "movement by rail" means movement of whole trains.

[57] *Id. supra* note 2, art. 38, para. 2.

[58] *Id. supra* note 2, art. 38, para. 4.

the final plenary with little result. The impasse was settled at the political level with the understanding that the amended article does not require the United States to redesign its vehicles to conform to German standards.[59]

Although the Germans wanted to curtail the ability of a sending state to issue driving licenses, the Article 9 revisions preserve the basics of the current system, much to the relief of soldiers and their dependents. Some interesting quirks now exist. A sending state may issue a driving license to a member of the force or civilian component to operate service vehicles, vessels, or aircraft in the territory of the Federal Republic. Once the sending state has issued such a license, it also may issue a driving license to operate a corresponding private vehicle.[60] A sending state still may issue—on the basis of a valid state-side driving license— a driving certificate to a member of the force, the civilian component, or a dependent.[61] Because some of these state-side driving licenses are likely to expire while the holder is overseas and the holder may not have the chance to renew it, the Federal Ministry of Transportation provided a letter that recognizes the continued validity of the certificate.[62] Those left out under the new scheme are dependents who have never had a license. Nevertheless, they (as well as members of the force, civilian component, and other dependents) may obtain a German driving license after completing a driving instruction course in a school operated by the sending state and taking a road test and written driving test in their own language. The instructors of the school must be professionally qualified, and German authorities—after consultation with authorities of the force—have the right to oversee the content of instruction and to ensure that driving tests are administered properly.[63]

The vehicle registration system was preserved. The amendments to Article 10 authorize German license plates in particular cases,[64] permit the Federal Republic to require the sending state to notify it of registrations,[65] and subject the vehicles registered to a technical inspection at regular intervals.[66] German inspectors are permitted to verify whether the sending state work shops are qualified to conduct inspections of vehicles and to spot check vehicles at the shops for roadworthiness.[67] The Germans wanted more control over safety aspects because they have the nagging suspicion that members of the sending states operate inadequate or deficient vehicles.

Legal Issues

The Death Penalty

Long an issue of great concern for the Germans, the death penalty was among the most difficult issues to resolve. The Germans not only wanted to prohibit the execution of a death sentence on its territory—which they can in any event by relying on Article VII paragraph 7(a) of the NATO SOFA[68]—but also to remove the authority of a sending state to try a capital case in the Federal Republic and to limit their obligation to render assistance in such cases.[69] The United States fought to

---

[59] The language was agreed at the Kimmitt-Lautenschlager meeting. Dr. Eitel's assurances at the plenary before the initialling will have to be memorialized in the *Denkschrift.* It will be important to set down and to flesh out what basic safety regulations are and how they interface with the design of equipment. The height of taillights was cited often as a specification that would not have to be met exactly. The United States will want brake requirements to be defined in terms of stopping distance, not a particular design.

[60] Agreement to Amend the SA, *supra* note 2, art. 3, para. 1.

[61] *Id. supra* note 2, art. 9, para. 2.

[62] An exchange of letters between the Federal Ministry of Transportation and the United States Embassy at the time of initialling preserves this understanding. The letter states that "[A]uthorization for the operation of personal vehicles in the Federal Republic of Germany remains in force even when the driver's license issued in the sending State expires, provided the owner is in possession of the certificate."

[63] Agreement to Amend the SA, *supra* note 2, art. 3, para. 2. New subparagraph (d) of paragraph 3 contains a transitional clause to allow those who in the process of receiving driving instruction when the Agreement to Amend the SA enters into force to continue under the old rules to obtain their driving privileges.

[64] *Id. supra* note 2, art. 4. (adding to the SA, Article 10, the new paragraph 1*bis*).

[65] *Id.* (the new paragraph 1*ter*).

[66] *Id.* (the new paragraph 1*quater*).

[67] *Id.*

[68] "A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case." NATO SOFA, *supra* note 2.

[69] The initial text proposed by the German delegation in the fall of 1991 was short and direct: "In exercising their jurisdiction under Article VII of the Nato Status of Forces Agreement the authorities of the sending States shall not impose the death penalty." The text was accompanied by a comment which explained the German rationale: "The Federal Government's proposal corresponds to a unanimous decision by the German Bundestag of 31 October 1990 and a decision by the Bundesrat of 14 December 1990. It is required by virtue of these decisions to conclude agreements within the framework of the provisions governing the exercise of penal jurisdiction over members of the armed forces and their dependents which are consistent with the Basic Law's prohibition of the death penalty."

preserve the "capital" option. The result, hammered out over the course of several months of long and arduous discussion, was a compromise (some would say a stand off). Under the new Article 18A, a sending state must notify German authorities without delay when it decides, in exercising Article VII jurisdiction of the NATO SOFA, to prosecute a capital case.[70] For the United States, referral will trigger this notification requirement. The sending states further agreed not only to refrain from carrying out a death sentence, but also not to "carry through a prosecution which may lead to the imposition of such a sentence in the Federal Republic."[71]

The Federal Republic of Germany still must meet its obligations to render assistance in criminal cases as set forth in Article VII of the NATO SOFA. The Protocol of Signature requires the Federal Republic to render assistance "if required by German statutory law or by treaty obligations accepted by the Federal Republic."[72] The United States will interpret these new provisions to mean that it can prosecute a "capital" case in the Federal Republic up to a point short of sentencing.[73] This does not mean that the United States will do so (based on the political sensitivity of such a prosecution). Moreover, the recall of the general waiver of the German primary right to exercise jurisdiction is automatic in concurrent cases notified as "capital."[74] Nevertheless, even in this volatile area, exceptional circumstances—such as the imminent threat of armed conflict—may move the authorities of a sending state and the competent German authorities to conclude arrangements to carry through a prosecution of a "capital case."[75]

Access to Accommodation

Sending state authorities—in cooperation with German authorities—grant appropriate access to their accommodations by designated German representatives to safeguard German interests in the property in areas such as public safety and order, industrial inspections, surveying and valuation, and assorted matters of land use.[76] The amendments are designed to clarify the right of access. Sending states must give competent German authorities reasonable assistance to fulfill their official duties to safeguard German interests. These authorities may be federal, *Laender*, or local level, and may come on accommodations after prior notification—or in an emergency without notification—but should not compromise military security or prejudice military exercises.[77] German police have an express right of access to an exclusive use accommodation in accordance with these provisions to maintain public order and safety to the extent that these affect the Federal Republic, but must take care not to prejudice the right of sending states to police their own accommodations.[78]

Civil Provisions

Article 32 of the SA requires German courts and authorities to use the liaison systems set up by sending states for service of the so-called "initiating document" in civil cases. Despite German attempts to abolish liaison agencies in favor of "direct" service of process from German courts and authorities in accordance with German law in civil cases, the sending states managed to retain them. In the sending states' view, liaison agencies have worked well by providing the protection of a guaranteed receipt and by helping the recipient understand the process that has been served. Although minor amendments were made to several paragraphs of Article 32, the major change is that German courts or authorities now "may" request liaison agencies "to ensure service of documents arising in non-criminal proceedings upon members of a force, of a civilian component, or on dependents." Furthermore, if service is effected directly, "the German court or

---

[70] Agreement to Amend the SA, *supra* note 2, art. 7 (Article 18A, para. 1).

[71] *Id.* (Article 18A, para. 2)

[72] *Id. supra* note 2, art. 8 (reference Article 18A, para. 1). The use of the term "carry through" (in German "*durchfuehren*") in paragraph 2 of Article 18A of the Agreement to Amend the SA was a compromise solution to deal with the obligation to render assistance. The German delegation maintained the position throughout the review that it would be unconstitutional (under Article 102 of the German Basic Law [*Grundgesetz*] which abolishes the death penalty) for German authorities to render assistance to a sending state in a case in which the death penalty would be possible. They realized that it would be impossible in some cases, however, for the sending states to even determine if the death penalty was an issue if German authorities failed to assist during the investigative process. The result was the use of language flexible enough to allow German authorities in good faith to render assistance in the initial stages of a proceeding without setting any "bright lines," thereby allowing the sending state and German authorities to deal with the issue of termination of assistance on a case-by-case basis.

[73] Legal advisors of the State Department and Department of Defense, agreed to take this interpretation in an exchange of letters dated August 31, 1992 and September 3, 1992, respectively.

[74] Agreement to Amend the SA, *supra* note 2, art. 9, para. 1.

[75] *Id. supra* note 2, art. 8 (reference Article 18A, para. 2).

[76] Protocol, *supra* note 2 (reference Article 53, paras. 5, 6).

[77] Agreement to Amend the SA, *supra* note 2, art. 28, para. 2 (reference Article 53, the new para. 4*bis*).

[78] *Id. supra* note 2, art. 12. *See generally* Gronimus, *Allied Security Forces in Germany: the NATO SOFA and Supplementary Agreement Seen From a German Perspective*, 136 MIL. L. REV. 43 (1992).

authority shall so notify the liaison agency in writing prior to or immediately upon the service of process."[79] One would assume that Germans will continue to use the liaison system, because the liaison agency keeps them notified if service cannot be effected and, if the person to be served has permanently departed the Federal Republic, gives assistance to the extent it can.[80]

Another significant change in the civil legal area is the elimination of the blanket exemption from incarceration in noncriminal proceedings that members of a force, civilian component, and dependents now enjoy. Under the new arrangement, a court or German authority only may deprive these persons of their liberty to punish contempt or "to secure compliance with a judicial or administrative order" that they have disregarded culpably.[81] Additionally, if a person's act or omission was done in the performance of an official duty, that individual may not be incarcerated. If "the highest appropriate authority of the sending State" issues a certificate to this effect, it binds the German agencies. Even in nonofficial duty cases, its representations that compelling interests weigh against incarceration must be duly considered.[82] Moreover, military authorities may insist on finding a replacement of the individual concerned before incarceration is allowed. In a text fashioned to meet the needs of the French, a provision was included providing that when a deprivation of liberty is to take place within an accommodation made available for the exclusive use of the force or of the civilian component, sending state police, after consultation with the German court or authorities, may carry out the incarceration.[83]

Labor Issues

Codetermination

In a time of alarming unemployment—brought on in part by unification and exacerbated by a stalling economy—the Federal Republic of Germany is extremely concerned about the employment prospects of German nationals who work for the sending states, especially during the current phase of force reductions. In addition to the concern of local civilian employees losing their jobs, the Germans want to ensure that German nationals who keep working for the sending states' forces do so in a legal status equivalent to that afforded those who work for the *Bundeswehr*. German law gives employees a right to have input in management decisions under a system called codetermination. Under the current SA, sending states observe only five of thirty-two statutory codetermination categories, and handle the rest in a cooperation procedure in which the force retains the decision authority. Extensive revision of the Protocol of Signature to Article 56, paragraph 9 reverses this proportion, subjecting all but five categories to codetermination, and even subjects the five excluded categories to a review after 31 December 1994 when most of the drawdowns of forces will have occurred.[84]

The five categories still exempt from codetermination are: engagement of employees, allocation and grading of duties, establishment of social plans, measures to increase productivity, and new work methods. Further limits on the right of codetermination are set out.[85] First, if the right of codetermination is "incompatible with military interests particularly worthy of protection," the highest service authority can restrict it to the extent necessary.[86] Second, a right of codetermination cannot hold up the return of an accommodation.[87] Third, if civilian labor and the civilian component are mixed in the same function or facility, the rights of codetermination in the layout of the workplace and management of social facilities may be limited.[88] Further limitations apply to military security, assignments, and matters regulated by tariff or the setting of terms and conditions of employment.[89] Where the rights of codetermination do not apply, the cooperation procedure applies.[90] Finally, decisions made by the conciliation committee to resolve disputes must "be within the framework

---

[79] Agreement to Amend the SA, *supra* note 2, art. 14, paras. 1, 4 (the new Article 32, paras. 1(a), 2).

[80] *Id. supra* note 2, art. 14, para. 3; art. 2, para. 1.

[81] *Id. supra* note 2, art. 16, para. 1 (the new Article 34, para. 2(a)). Interestingly, this language was tinkered with severely after the initialling during two editing sessions.

[82] *Id.*

[83] *Id.* (the new Article 34, para. 2(b), (c)).

[84] *Id. supra* note 2, art. 37 (reference Article 56, para. 9).

[85] *Id. supra* note 2, art. 37, para. 3 (reference Article 56, paras. 6(a), 9).

[86] *Id.* (para. 6(a)(i)).

[87] *Id.* (para. 6(a)(ii)).

[88] *Id.* (para. 6(a)(iii)).

[89] *Id.* (para. 6(a)(iv-vi).

[90] *Id.* (para. 6(b)).

of legal provisions, including the budgetary laws of a sending State."[91] This is an availability of funds protection.

The issue of codetermination was difficult for the Germans and sending states to resolve. For the Germans, it was a matter of principle that German law must apply. For the sending states, in particular the United States, the potential impact on costs and the prerogative to manage one's work force were crucial. The Germans only relented on codetermination when they saw the United States would concede no more, and they determined that this agreement was better than none. But even at the plenary the day before the initialling, Dr. Eitel, the German chief negotiator, was emphasizing codetermination's prominence and putting everyone on notice that the Germans will call for a review of the remaining five categories at the earliest possible time. State Secretary Kastrup repeated this warning at the signing ceremony.

Other labor issues paled in comparison to codetermination. New language makes German law applicable to the sending state forces' handling of security dismissals of employees. Although a force no longer is exempt from explaining the reasons to a German court, it can establish credibility in camera to protect military interests, and in the interest of not jeopardizing security, file a formal declaration in concert with the Federal Chancellery to establish credibility.[92] The parties agreed to apply German industrial safety law to civilian labor more or less on the same basis that it applies to civilian employees of the German Armed Forces,[93] but this will not affect the technical requirements of facilities in use before March 18, 1993, except if they are modified extensively, or avoidable risks to life would be expected as a result.[94]

A final German desire—to have a guaranteed proportionality of German workers as compared to the civilian component, especially during the reduction in forces—did not find fertile ground. This politically charged issue was about the last thing resolved before the initialling.[95] None of the sending states agreed, despite letters of entreaty from Foreign Minister Kinkel to the sending states' foreign ministers.[96] The sending states eventually supplied a letter on this issue. The United States provided a letter promising "best efforts" to retain local civilian labor, but made it subject to budgetary and force level considerations.[97]

Termination Clause

The sending states accepted the German proposal to let any contracting party unilaterally terminate the SA without terminating the Presence Agreement or denouncing the NATO SOFA. The current language requires the Federal Republic to terminate the Presence Convention or to denounce the NATO SOFA. The new Article 81 consists of two simple statements. After consultation with the other contracting parties, a sending state may withdraw from the SA on two years notice. The Federal Republic of Germany, with the same consultation and notice requirements, may terminate the SA in respect to one or more of the contracting parties.[98] If the Germans elected to exercise their termination rights selectively, then the various sending state forces could be governed by different arrangements, which would lead to a confusing array of interpretations of rights and duties of sending state forces.

Miscellaneous Issues

Dispute Resolution

A new Article 80A details a dispute resolution mechanism to resolve differences in the application or interpretation of the SA. The current provisions simply refer disputes to higher authorities.[99] The new provisions give more structure, but do

---

[91] *Id.* (para. 6(d)).

[92] *Id. supra* note 2, art. 33, para. 4.

[93] *Id. supra* note 2, art. 93, para. 1; *see also* art. 34 (reference Article 56, para. 1, para. 3).

[94] *Id. supra* note 2, art. 34 (reference Article 56, paras. 1, 4).

[95] Although the German press did not cover the SA review extensively, an article appeared one month before the initialling lamenting that German nationals who work for the United States forces were laid off more easily than those who work for the *Bundeswehr.* In this period of force reductions, this ostensible unfairness is especially heightened. *Leichter Entlassen,* DER SPIEGEL, Dec. 7, 1992, at 95. Even the day before initialling, the Germans were tweaking with the best way to translate "to retain" local civilian employees in the proportionality letter. They settled on "*weiterhin zu beschaeftigen*" instead of "*weiter zu beschaeftigen.*" The nuance may be that the United States should not only keep the employees that it currently employs, but in the future should take steps to hire German nationals.

[96] These were follow-on letters after the November meeting between Ambassador Kimmitt and State Secretary Lautenschlager. Eventually the Germans had to resign themselves that the sending states could not unify on one proportionality letter. Each sending state did exchange a letter at the signing of the Agreement to Amend the SA.

[97] The United States letter praises and thanks the German civilian workers employed over the years, but promises only to use its best efforts to retain them with several conditions. Budget and skill considerations, as well as force levels, which change according to the security needs of the United States, will be factored into the equation of whether to retain.

[98] Agreement to Amend the SA, *supra* note 2, art. 51.

[99] *Id. supra* note 2, art. 3(7).

not constitute an agreement to submit disputes to arbitration. In the absence of a separate procedure, the parties are to consult at the lowest appropriate level and, if necessary, refer the difference to higher civilian or military authorities. If these authorities do not resolve the issue within fifteen days, either party may request that the dispute be resolved by a consultative commission consisting of members that they have chosen.[100] The consultative commission should hold its first meeting within ten days of the request and issue a final recommendation within sixty days of its first meeting. The parties then should implement the final recommendation. If the commission cannot reach a recommendation within sixty days, or if any party objects within fifteen days to the recommendations, "the matter shall be referred to diplomatic channels for prompt resolution."[101] The consultative commission may seek expert opinions from individuals or organizations and recommend that the parties take interim measures pending resolution.[102] Pending resolution, no party should take any action "that would prejudice the essential interests of any other Party directly concerned . . . ."[103]

Postal Facilities

Despite the contention that German postal facilities should be used by the sending state forces because they are a German monopoly, and to allow other postal systems to operate is a derogation of German sovereignty, the sending states fought for and kept the current Article 59 without any changes. Thus, sending state post offices are retained. This preserves a quality of life feature to which soldiers, civilian components, and dependents have grown accustomed and saves costs for them as well as the force.

Telecommunications

Revisions to Article 60 require that telecommunication facilities that are interconnected with the public networks of the Federal Republic not only be "technically and operationally compatible with such network," which is what the current text requires, but also that they comply with the basic requirements of German legal regulations. A transition period takes into account existing special features. This transition period terminates only by mutual agreement. Exceptions to the requirement to comply with German regulations are possible for equipment possessed or procured by a force prior to the entry into force of the revised provisions if the Federal Minister of Post and Telecommunications and the force agree.[104] The Federal Minister of Post and Telecommunications also should advocate the interests of the forces in applying and interpreting these provisions.[105] A new administrative agreement to implement Article 60 ensures a close cooperation between the sending state forces and the Federal Republic in the request for and provision of telecommunication services as well as any regulatory changes that may occur.[106]

Taxes

Two tax issues surfaced in the review of the SA. The first eliminated the exemption from turnover tax for "sales of undeveloped and developed land as well as to the construction of buildings" if they are private transactions.[107] This affects the purse of persons who own real property, but not the United States government. The second issue concerned real property taxes. The United States pressed to gain an exemption in the SA from paying the German real *Grundsteuer* [property tax] as a current public charge.[108] It was unsuccessful. The result was an exchange of letters whereby the United States emphasized that it will continue its practice of not paying these charges and the Federal Republic, in response notes, that its position has not changed.[109]

Reciprocity

The final resolution to reciprocity was in the form of an exchange of letters in which the United States declared its readiness to take up constructively any German request to make arrangements for the German troops, civilians, and fam-

---

[100] *Id. supra* note 2, art. 50, para. 2.

[101] *Id. supra* note 2, art. 50, para. 4

[102] *Id. supra* note 2, art. 50 paras. 2(b), 3.

[103] *Id. supra* note 2, art. 50, para. 5.

[104] *Id. supra* note 2, art. 39, para. 4.

[105] *Id. supra* note 2, art. 39, para. 6.

[106] Administrative Agreement to Implement Article 60 of the Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany [hereinafter Article 60 Administrative Agreement].

[107] Agreement to Amend the SA, *supra* note 2, art. 42, para. 1.

[108] *Id. supra* note 2, art. 63(4).

[109] Only the United States exchanged these letters. They are maintained in the United States Embassy, Bonn.

ilies in the United States that would be comparable to those enjoyed by United States personnel in Germany under the SA, subject to any constitutional or legal requirements and compatible with "the missions and needs of [the] respective forces." Reciprocity, which the sending states had resisted becoming a part and principle of the SA review, in the end was handled outside the revisions to the SA.[110]

Conclusion

The SA review was a process the Germans needed to wade through for political reasons. The sending states, to their credit, acknowledged this reality and cooperated in the endeavor. Throughout the negotiations, the Germans persisted in expressing as unequivocally as possible that German law applied to sending state activities. The sending states sought to leave longstanding efficient practices undisturbed. The negotiators reworded offensive language, deleted obsolete provisions, and accounted for changed circumstances and conditions, which should substantially meet German objectives. The United States attained its goals of preserving mission effectiveness and quality of life without significant increase in costs. The facelift should make the SA more palatable politically for all Germans, even if it does not go far enough for some. A beneficial side effect of the protracted and arduous negotiations is a renewed mutual respect and a good working relationship that the German representatives and their sending state counterparts have developed. This bodes well for future dealings.

The SA review will not be the cause of any great historic turn; it was a logical effect of the collapse of the Warsaw Pact and the unification of Germany, even in the face of the changing need for military troops in Europe. While the Agreement to Amend the SA itself may not be momentous, it is a reflection of historic and crucial events and may come to symbolize the beginning of a new period of mutual respect and cooperation between the Federal Republic of Germany and its allies.

[110]Each of the sending states exchanged reciprocity letters at the signing of the Agreement to Amend the SA. Once again they were not identical, to the disappointment (but in line with a pragmatic approach) of the Germans who wanted to reach an agreement.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), recently promulgated *The ELD Bulletin*. This bulletin is designed to inform Army environmental law practitioners of current developments in the environmental law arena. The bulletin will appear on the Legal Automated Army-Wide Bulletin Board System (LAAWS BBS), Environmental Law Conference, while hard copies will be distributed on a limited basis. The contents of the first issue are reproduced below:

Water Rights Issues

Payment of Filing Fees

Many states require the payment of filing fees or other monetary assessments in connection with applications for the use of surface and ground water and in adjudications or proceedings in state administrative and judicial forums. The United States Supreme Court recently held that the United States is not required to pay filing fees in state judicial general stream adjudications pursuant to the McCarran Amendment, 43 U.S.C. § 666(a).[1] The decision did not address the payment of filing fees in non-McCarran lawsuits or state administrative proceedings. The Army's policy is that installations will not pay filing fees in connection with those proceedings or water rights applications. The ELD approves requests for exceptions to this policy. Major Graham.

Clean Water Act (CWA) Legislation

Legislation is pending in Congress (S.1114, H.R. 340, and H.R. 2580) to amend the CWA. The bills contain broad waivers of sovereign immunity and authorize the Environmental Protection Agency (EPA) and the states to assess penalties and conduct enforcement actions against federal facilities. If passed, this legislation will have a significant impact on Army installations. Major Graham.

[1] United States v. Idaho, *ex rel.* Director, Idaho Dep't of Water Resources, 113 S. Ct. 1893 (1993).

Clean Air Act (CAA)

The Conformity Rule

The EPA proposed a rule implementing the conformity requirement of the CAA §176(c) on 15 March 1993.[2] This rule, scheduled to take effect in November 1993, is undergoing final review at the OMB. The EPA has revised the rule significantly since it was proposed. The rule will require federal agencies to conduct detailed conformity analyses and determinations for many activities within nonattainment areas. Conformity determinations will be expensive and time consuming to complete. Public notice and a forty-five-day comment period is required. Activities that are not in conformity with state or federal implementation plans (SIP) cannot proceed without an enforceable mitigation plan. It will be important to identify activities that can be grandfathered under the rule and to take the necessary steps. The final version of the rule should have been made available by October 1993. If your installation is in a nonattainment area, it is important that you watch the LAAWS BBS for the latest developments.

Refrigerant Recycling

On 14 May 1993, the EPA promulgated refrigerant recycling regulations implementing the CAA § 608.[3] The regulations establish: air conditioning and refrigeration servicing and disposal standards to maximize recycling of ODSs; certification requirements for recycling equipment and refrigerant technicians; restrictions on the sale of refrigerants to certified technicians; requirements to repair refrigeration equipment leaks; and requirements to remove ODSs prior to disposal of equipment, such as refrigerators and air conditioners. Major Teller.

Fines and Penalties

CAA Penalties

The Federal Facility Compliance Act (FFCA) requires payment of civil fines and penalties only for violations of the Resource Conservation and Recovery Act (RCRA) solid and hazardous waste laws. The FFCA does not amend the waiver of sovereign immunity for penalties under other environmental laws such as the CWA or the Safe Drinking Water Act (SDWA), or for violations of the RCRA § 6991 Underground Storage Tank requirements. The law is less clear for the CAA. The Army's position is that there is no waiver of sovereign immunity for payment of civil penalties under the CAA. While some district court decisions are contrary, the Army's position is based on the analysis in *Department of Energy v. Ohio*.[4] Notify your MACOM ELS of notices of CAA violations that may result in fines or penalties. You may work with the state to negotiate payment of a lesser amount, characterized other than as a fine or penalty. Major Miller.

Base Realignment and Closure (BRAC)

Accelerated Cleanup Policy

On 2 July 1993, the President announced his five-part program to speed economic recovery at communities surrounding closing bases. The first element of the program involves fast track cleanup initiatives. On 9 September 1993, the Department of Defense issued its policy guidance, entitled "Fast Track Cleanup at Closing Installations." It was forwarded to MACOMs on 17 September 1993 by the Assistant Chief of Staff for Installation Management, Base Realignment and Closure Office (ACSIM BRACO). Look for it—the program will require speedy implementation. Major Miller.

Resource Conservation and Recovery Act (RCRA)

RCRA Fines

The EPA and state regulators have become increasingly aggressive in enforcement of solid and hazardous waste regulations since the passage of the FFCA in October 1992. Between March and October 1993, regulators have assessed over two million in RCRA fines, primarily for violations of technical requirements. Written or verbal notifications of fines must be reported expeditiously through the MACOM to the ELD.

Fine Components

The EPA follows its RCRA Civil Penalty Policy (29 October 1990) in imposing fines. States may borrow from the EPA's policy or establish their own; some have published specific fines for specific violations. The EPA's policy describes four components in calculating fines: (1) gravity-based penalty; (2) multi-day penalty; (3) economic benefit of noncompliance (based on the BEN Model); and (4) adjustment factors (good faith or lack of good faith, willfulness or negligence, history of noncompliance, and ability to pay). You must be familiar with each component. The EPA also has encouraged federal facilities to identify Supplemental Environmental Projects (SEP) as a way of reducing the cash amount of fines. The EPA's SEP policy (12 February 1991) sets out the criteria

---

[2] 58 Fed. Reg. 13,836 (1993).

[3] *Id.* at 28,660.

[4] 112 S. Ct. 1627 (1992).

for such projects. Because of Department of the Army-wide (DA) implications, you should coordinate with your MACOM ELS and ELD in negotiating fines.

40 C.F.R. Part 22 Procedures

In imposing RCRA fines, the EPA treats federal facilities as it would the XYZ corporation. The EPA follows the procedures outlined in Title 40 of the *Code of Federal Regulations*, Part 22, which sets out the specific guidelines that installations must follow to preserve their rights. The EPA also has published supplemental guidance at Volume 58 of the *Federal Register* 49,044 (21 September 1993) on the FFCA mandated conference between the EPA Administrator and the agency head before a fine becomes final. While complying with the formal administrative scheme, you should pursue informal negotiations with the regulators as well. Contact your MACOM ELS or ELD for assistance. Major Bell.

Pollution Prevention

On 3 August 1993, the President signed Executive Order (EO) 12,856, "Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements." This EO will have a significant impact on your environmental mission. It requires federal agencies to: (1) develop pollution prevention strategies within one year; (2) reduce by fifty percent their emissions of toxic chemicals by 1999; and (3) comply with the Emergency Planning and Community Right-to-Know Act and the Pollution Prevention Act, including emergency planning and toxic release inventory reporting for covered installations. Federal facilities are required to have plans to meet the emissions reduction goal by 1 January 1996. The Directorate of Environmental Programs is currently developing a DA policy and detailed guidance to implement the EO. Mr. Nixon

DAD Notes

Expanding the Good Soldier Defense—
Use of Character Evidence as a Defense at Trial

The "Good Soldier" defense long has been recognized as permissible in courts-martial.[5] Defense counsel should be aware, however, that character evidence can be applied more broadly when used as part, or all, of a defense.

Military Rule of Evidence (MRE) 404(a) allows an accused to introduce evidence of a pertinent character trait.[6] The United States Court of Military Appeals (COMA) has held that good military character evidence is pertinent in defense of sodomy and drug charges.[7] The Army Court of Military Review (ACMR) has broadened the scope to allow admission of such evidence as a defense to any charge.[8] The ACMR's ruling recognizes the Supreme Court's observation that evidence of an accused's good character "alone, in some circumstances, may be enough to raise a reasonable doubt of guilt."[9] The cited words have been made part of the military judge's instruction on character evidence.[10]

Military accused are not limited to evidence of good military character. Other character traits may be pertinent within the meaning of MRE 404(a). Military courts have recognized that the character trait for law-abidingness is a pertinent character trait in every instance.[11] In *United States v. Elliott*, the COMA held that the accused's trusting nature was a pertinent character trait in defense of a larceny charge.[12] The COMA catalogued other character traits it had recognized in previous cases: peacefulness and "character as a drill instructor and . . . dedication to being a good drill instructor."[13]

In effect, evidence of any *pertinent* character trait can be introduced as a defense. The key is that the trait must be pertinent. The COMA has considered a character trait "perti-

---

[5] *See* United States v. Vandelinder, 20 M.J. 41, 45-46 (C.M.A. 1985) (discussing "good military character" as a pertinent trait).

[6] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 404(a) (1984) [hereinafter MCM].

[7] *See* United States v. McNeil, 17 M.J. 451 (C.M.A. 1984) (sodomy); United States v. Belz, 20 M.J. 33 (C.M.A. 1985) (drugs).

[8] *See* United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984).

[9] Michelson v. United States, 335 U.S. 469, 476 (1948).

[10] *See* DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 7-8 (1 May 1982).

[11] *See, e.g.*, United States v. Clemons, 16 M.J. 44 (C.M.A. 1983).

[12] United States v. Elliott, 23 M.J. 1 (C.M.A. 1986). In *Elliott*, the accused asserted that a friend gave him the television set that he was accused of stealing. *Id.* at 2-3. The defense offered evidence of his trusting nature in an effort to show that he unwittingly accepted the stolen item. *Id.* at 3-4.

[13] *Id.* at 5. *See* United States v. Shields, 20 M.J. 174 (C.M.A. 1985); United States v. Piatt, 17 M.J. 442 (C.M.A. 1984).

nent" "when it is directed to the issue or matters in dispute, and legitimately tends to prove the allegations of the party offering it."[14] For example, the ACMR recently has granted review on a case where the accused, in his defense against a charge of wrongful use of cocaine, attempted to introduce evidence of his religious beliefs and his adherence to them.[15] Evidence of an accused's religious character can be a pertinent character trait when it tends to impact on the question of whether the accused committed a particular offense. This is especially true in a prosecution for wrongful use of a controlled substance, in which case evidence of an accused's character as an abstinent would be extremely pertinent.

Occasionally, an accused's effort to introduce a pertinent character trait may appear to run afoul of another rule of evidence. This was the case in *United States v. Brown*, where the military judge found that MRE 610 prohibited the accused from offering evidence of his religious character.[16] The appellant in *Brown* argued that religious evidence used as part of a defense is admissible notwithstanding MRE 610. Indeed, the Supreme Court and the COMA have held that the rigid application of the rules of evidence must give way when it interferes with an accused's efforts to present a defense.[17]

Defense counsel must stress this point to the military judge when offering character evidence: this evidence is not merely an effort to bolster the accused's credibility as a witness (if, in fact, the accused will testify at trial); it is part of the accused's Sixth Amendment right to present a defense. With the right accused—a noncommissioned officer with fifteen to twenty years of service and numerous awards and commendations—using the accused's good character as a defense can be quite effective. Certainly, it should be considered as a complement to, and in conjunction with, any other defense that presents itself. Captain Andrea.

---

[14] *See Elliott*, 23 M.J. at 5 (quoting BLACK'S LAW DICTIONARY 1030 (5th ed. 1979)); *see also* United States v. Stanley, 15 M.J. 949, 951 (A.F.C.M.R. 1983) ("pertinent" has been interpreted as synonymous with "relevance") (citation omitted).

[15] United States v. Brown, ACMR 9101477 (A.C.M.R. 16 Dec. 1992) (unpub). The ACMR reached a 1-1-1 decision on this issue, with one judge dissenting on the sentence only and one dissenting entirely. The accused was a devout Pentecostal who abstained from drinking, smoking, dancing, and other activities that violated the tenets of his faith. The defense sought to offer the testimony of his pastor and his wife. According to the defense, the witnesses would have testified about the nature of his religious beliefs and how faithfully the accused adhered to those beliefs.

[16] MCM, *supra* note 6, MIL. R. EVID. 610. This rule prohibits parties from introducing the religious character of a *witness* for the purposes of either impeaching or bolstering that witness's credibility. *See, e.g.*, United States v. Felton, 31 M.J. 526, 532-33 (A.C.M.R. 1990) (trial counsel's introduction of evidence of accused's religious habits improper where not relevant to the charged offenses).

[17] *See* Davis v. Alaska, 415 U.S. 308, 317 (1974) (state's interest in protecting confidentiality of juvenile records must give way to defendant's right to confrontation). *Cf.* United States v. Coffin, 25 M.J. 32, 34 (C.M.A. 1987) (rigid application of Mil. R. Evid. 311(d)(2)(A) must give way to accused's right to raise suppression motion).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer;* send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Tax Note

Final Combat Zone Compensation Rules

The Internal Revenue Service recently announced final regulations covering compensation received for active military service in a combat zone.[1] These regulations revise existing

---

[1] T.D. 8489, 58 Fed. Reg. 47639-01 (1993).

regulations under section 112 of the Internal Revenue Code.[2] The final regulations provide specific examples of combat zone compensation, service in an area outside a combat zone that qualifies the military member for combat zone treatment, and nonqualifying presence in a combat zone.[3] These examples are reprinted below. Lieutenant Colonel Hancock.

Combat Zone Compensation Examples

These examples illustrate the compensation exclusion rules for service in a combat zone:

Example 1. On January 5, outside of a combat zone, an enlisted member received basic pay for active duty services performed from the preceding December 1 through December 31. On December 4 (and no other date), the member performed services within a combat zone. The member may exclude from income the entire payment received on January 5, although the member served in the combat zone only one day during December, received the payment outside of the combat zone, and received the payment in a year other than the year in which the combat zone services were performed.

Example 2. From March through December, an enlisted member became entitled to twenty-five days of annual leave while serving in a combat zone. The member used all twenty-five days of leave in the following year. The member may exclude from income the compensation received for those twenty-five days, even if the member performs no services in the combat zone in the year the compensation is received.

Example 3. From March through December, a commissioned officer became entitled to twenty-five days of annual leave while serving in a combat zone. During that period the officer also received basic pay of $1000 per month from which the officer excluded from income $500 per month (exhausting the monthly dollar limit under section 112 for that period). The officer used all twenty-five days of leave in the following year. The officer may not exclude from income any compensation received in the following year related to those twenty-five days of leave, because the officer had already excluded from income the maximum amount of combat zone compensation for the period in which the leave was earned.

Example 4. In November, while serving in a combat zone, an enlisted member competing for a cash award submitted an employee suggestion. After November, the member neither served in a combat zone nor was hospitalized for wounds incurred in the combat zone. In June of the following year, the member's suggestion was selected as the winner of the competition and the award was paid. The award can be excluded from income as combat zone compensation although granted and received outside of the combat zone, because the member completed the necessary action to win the award (submission of the suggestion) in a month during which the member served in the combat zone.

Example 5. In July, while serving in a combat zone, an enlisted member voluntarily reenlisted. After July, the member neither served in a combat zone nor was hospitalized for wounds incurred in the combat zone. In February of the following year, the member received a bonus as a result of the July reenlistment. The reenlistment bonus can be excluded from income as combat zone compensation although received outside of the combat zone, since the member completed the necessary action for entitlement to the reenlistment bonus in a month during which the member served in the combat zone.

Example 6. In July, while serving outside a combat zone, an enlisted member voluntarily reenlisted. In February of the following year, the member, while performing services in a combat zone, received a bonus as a result of the July reenlistment. The reenlistment bonus cannot be excluded from income as combat zone compensation although received while serving in the combat zone, because the member completed the necessary action for entitlement to the reenlistment bonus in a month during which the member had neither served in the combat zone nor was hospitalized for wounds incurred while serving in a combat zone.

Combat Zone Treatment for Service in an Area Outside the Combat Zone

Armed Forces members performing military service in an area outside the area designated by Executive Order as a combat zone are deemed to serve in that combat zone while the members' service is in direct support of military operations in that zone and qualifies the members for special pay for duty subject to hostile fire or imminent danger.

The following examples illustrate this rule and are based on the following circumstances: Certain areas, airspace, and adjacent waters are designated as a combat zone for purposes of section 112 as of May 1. Some members of the Armed Forces are stationed in the combat zone; others are stationed in two foreign countries outside the combat zone, named Nearby Country and Destination Country.

Example 1. *B* is a member of an Armed Forces ground unit stationed in the combat zone. On May 31, *B*'s unit crosses into Nearby Country. *B* performs military service in Nearby Country in direct support of the military operations in the

[2] For a general discussion of the combat zone exclusion, *see* Note, *President Paves Way for Tax Benefits by Declaring Persian Gulf Area a Combat Zone,* ARMY LAW., Mar. 1991, at 54. Section 112 of the Internal Revenue Code excludes from gross income certain compensation military members receive for active duty in a "combat zone." This exclusion applies to compensation received for the period of active service in the combat zone and to compensation received for the period in which the service member is hospitalized as a result of wounds, disease, or injury incurred while serving in the combat zone.

[3] The entire Treasury Decision has been uploaded on the Legal Automation Army-Wide System Bulletin Board System in the Legal Assistance Conference.

combat zone from June 1 through June 8 that qualifies *B* for hostile fire/imminent danger pay. *B* does not return to the combat zone during June. *B* is deemed to have served in the combat zone from June 1 through June 8. Accordingly, *B* is entitled to the exclusion under section 112 for June. Of course, *B* also is entitled to the exclusion for any month (May, in this example) in which *B* actually served in the combat zone.

Example 2. *B* is a member of an Armed Forces ground unit stationed in the combat zone. On May 31, *B*'s unit crosses into Nearby Country. On June 1, *B* is wounded while performing military service in Nearby Country in direct support of the military operations in the combat zone that qualifies *B* for hostile fire/imminent danger pay. On June 2, *B* is transferred for treatment to a hospital in the United States. *B* is hospitalized from June through October for those wounds. *B* is deemed to have incurred the wounds while serving in the combat zone on June 1. Accordingly, *B* is entitled to the exclusion under section 112 for June through October. Of course, *B* also is entitled to the exclusion for any month (May, in this example) in which *B* actually served in the combat zone.

Example 3. *B* is stationed in Nearby Country for the entire month of June as a member of a ground crew servicing combat aircraft operating in the combat zone. *B*'s service in Nearby Country during June does not qualify *B* for hostile fire/imminent danger pay. Accordingly, *B* is not deemed to have served in the combat zone during June and is not entitled to the exclusion under section 112 for that month.

Example 4. *B* is assigned to an air unit stationed in Nearby Country for the entire month of June. In June, members of air units of the Armed Forces stationed in Nearby Country fly combat and supply missions into and over Destination Country in direct support of military operations in the combat zone. *B* flies combat missions over Destination Country from Nearby Country from June 1 through June 8. *B*'s service qualifies *B* for hostile fire/imminent danger pay. Accordingly, *B* is deemed to have served in the combat zone during June and is entitled to the exclusion under section 112. The result would be the same if *B* were to fly supply missions into Destination Country from Nearby Country in direct support of operations in the combat zone qualifying *B* for hostile fire/imminent danger pay.

Example 5. Assigned to an air unit stationed in Nearby Country, *B* was killed in June when *B*'s plane crashed on returning to the airbase in Nearby Country. *B* was performing military service in direct support of the military operations in the combat zone at the time of *B*'s death. *B*'s service also qualified *B* for hostile fire/imminent danger pay. *B* is deemed to have died while serving in the combat zone or to have died as a result of wounds, disease, or injury incurred while serving in the combat zone for purposes of section 692(a) and section 692(b) (providing relief from certain income taxes for members of the Armed Forces dying in a combat zone or as a result of wounds, disease, or injury incurred while serving in a combat zone) and section 2201 (providing relief from certain estate taxes for members of the Armed Forces dying in a combat zone or by reason of combat-zone-incurred wounds). The result would be the same if *B*'s mission had been a supply mission instead of a combat mission.

Example 6. In June, *B* was killed as a result of an off-duty automobile accident while leaving the airbase in Nearby Country shortly after returning from a mission over Destination Country. At the time of *B*'s death, *B* was not performing military duty qualifying *B* for hostile fire/imminent danger pay. *B* is not deemed to have died while serving in the combat zone or to have died as the result of wounds, disease, or injury incurred while serving in the combat zone. Accordingly, *B* does not qualify for the benefits of section 692(a), section 692(b), or section 2201.

Example 7. *B* performs military service in Nearby Country from June 1 through June 8 in direct support of the military operations in the combat zone. Nearby Country is designated as an area in which members of the Armed Forces qualify for hostile fire/imminent danger pay due to imminent danger, even though members in Nearby Country are not subject to hostile fire. *B* is deemed to have served in the combat zone from June 1 through June 8. Accordingly, *B* is entitled to the exclusion under section 112 for June.

Nonqualifying Presence in Combat Zone

In some instances military members may be present in a combat zone and not qualify for an exclusion of all or part of their pay from gross income.[4] These examples illustrate this rule. They are based on the following circumstances: Certain areas, airspace, and adjacent waters are designated as a combat zone for purposes of section 112 as of May 1. Some members of the Armed Forces are stationed in the combat zone; others are stationed in two foreign countries outside the combat zone, named Nearby Country and Destination Country.

---

[4] The regulation lists these situations where presence in a combat zone does not qualify the member for the exclusion:

(i) Members present in a combat zone while on leave from a duty station located outside a combat zone;

(ii) Members who pass over or through a combat zone during the course of a trip between two points both of which lie outside a combat zone; or

(iii) Members present in a combat zone solely for their own personal convenience.

Example 1. *B* is a member of the Armed Forces assigned to a unit stationed in Nearby Country. On June 1, *B* voluntarily visits a city within the combat zone while on leave. *B* is not deemed to have served in a combat zone because *B* is present in a combat zone while on leave from a duty station located outside a combat zone.

Example 2. *B* is a member of the Armed Forces assigned to a unit stationed in Nearby Country. During June, *B* takes authorized leave and elects to spend the leave period by visiting a city in the combat zone. While on leave in the combat zone, *B* is subject to hostile fire qualifying *B* for hostile fire/imminent danger pay. Although *B* is present in the combat zone while on leave from a duty station outside the combat zone, *B* qualifies for the exclusion under section 112 because *B* qualifies for hostile fire/imminent danger pay while in the combat zone.

Example 3. *B* is a member of the Armed Forces assigned to a ground unit stationed in the combat zone. During June, *B* takes authorized leave and elects to spend the leave period in the combat zone. *B* is not on leave from a duty station located outside a combat zone, nor is *B* present in a combat zone solely for *B*'s own personal convenience. Accordingly, *B*'s combat zone tax benefits continue while *B* is on leave in the combat zone.

Example 4. *B* is assigned as a navigator to an air unit stationed in Nearby Country. On June 4, during the course of a flight between *B*'s home base in Nearby Country and another base in Destination Country, the aircraft on which *B* serves as a navigator flies over the combat zone. *B* is not on official temporary duty to the airspace of the combat zone and does not qualify for hostile fire/imminent danger pay as a result of the flight. Accordingly, *B* is not deemed to serve in a combat zone because *B* passes over the combat zone during the course of a trip between two points both of which lie outside the combat zone without either being on official temporary duty to the combat zone or qualifying for hostile fire/imminent danger pay.

Example 5. *B* is a member of the Armed Forces assigned to a unit stationed in Nearby Country. *B* enters the combat zone on a three-day pass. *B* is not on official temporary duty and does not qualify for hostile fire/imminent danger pay while present in the combat zone. Accordingly, *B* is not deemed to serve in a combat zone because *B* is present in the combat zone solely for *B*'s own personal convenience.

Example 6. *B*, stationed in Nearby Country, is a military courier assigned on official temporary duty to deliver military pouches in the combat zone and in Destination Country. On June 1, *B* arrives in the combat zone from Nearby Country, and on June 2, *B* departs for Destination Country. Although *B* passes through the combat zone during the course of a trip between two points outside the combat zone, *B* is nevertheless deemed to serve in a combat zone while in the combat zone because *B* is assigned to the combat zone on official temporary duty.

Example 7. *B* is a member of an Armed Forces ground unit stationed in Nearby Country. On June 1, *B* took authorized leave and elected to spend the leave period by visiting a city in the combat zone. On June 2, while on leave in the combat zone, *B* was wounded by hostile fire qualifying *B* for hostile fire/imminent danger pay. On June 3, *B* was transferred for treatment to a hospital in the United States. *B* is hospitalized from June through October for those wounds. Although *B* was present in the combat zone while on leave from a duty station outside the combat zone, *B* is deemed to have incurred the wounds while serving in the combat zone on June 2, because *B* qualified for hostile fire/imminent danger pay while in the combat zone. Accordingly, *B* is entitled to the exclusion under section 112 for June through October.

Example 8. The facts are the same as in Example 7 except that *B* dies on September 1 as a result of the wounds incurred in the combat zone. *B* is deemed to have died as a result of wounds, disease, or injury incurred while serving in the combat zone for purposes of section 692(a) and section 692(b) (providing relief from certain income taxes for members of the Armed Forces dying in a combat zone or as a result of wounds, disease, or injury incurred while serving in a combat zone) and section 2201 (providing relief from certain estate taxes for members of the Armed Forces dying in a combat zone or by reason of combat-zone-incurred wounds).

Using the Soldiers' and Sailors' Civil Relief Act to Your Clients' Advantage

Much has been written about the Soldiers' and Sailors' Civil Relief Act (SSCRA)[5], particularly in light of Desert Shield/Storm.[6] This note attempts to supplement those articles by raising questions about the SSCRA's applicability in certain circumstances and how they might be approached.

---

[5] 50 U.S.C. App. §§ 500-548, 560-593 (1990), as amended by the Soldier's and Sailor's Civil Relief Act Amendments, Pub. L. No. 102-12, 105 Stat. 39 (1991) [hereinafter SSCRA Amendments].

[6] Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act,* 32 SANTA CLARA L. REV. 137 (1992); Huckabee, *Operations Desert Shield and Desert Storm: Resurrection of the Soldiers' and Sailors' Civil Relief Act,* 132 MIL. L. REV. 141 (1991); Kay, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act,* 27 TULSA L.J. 45 (Fall 1991); McKonough et. al, *Crisis of the Soldiers' and Sailors' Civil Relief Act: A Call for the Ghost of Major (Professor) John Wigmore,* 43 MERCER L. REV. 667 (Winter 1992); Pottorff, *Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act,* 132 MIL. L. REV. 115 (1991); Bradshaw, et al., *Soldiers' Tort Claims and the Soldiers' and Sailors' Civil Relief Act,* ARMY LAW., July 1991, at 40; Legal Assistance Note, *Soldiers' and Sailors' Civil Relief Act: A Look at the Credit Industry's Approach to the Six Percent Limit on Interest Rates,* ARMY LAW., Nov. 1990, at 49; Legal Assistance Note, *Soldiers' and Sailors' Civil Relief Act Protection for Active and Reserve Component Personnel,* ARMY LAW., Oct. 1990, at 49; Legal Assistance Note, *Soldiers' and Sailors' Civil Relief Act Update: Section 525 Means What It Says,* ARMY LAW., June 1993, at 50; Reinold, *Use of the Soldiers' and Sailors' Civil Relief Act to Ensure Court Participation—Where's the Relief?,* ARMY LAW., June 1986, at 17.

Does the SSCRA Apply to My Client?[7]

It seems well settled that persons, including guardsmen and reservists while in active federal military service,[8] are protected,[9] but what about those in the National Guard performing fulltime state duty? Even though they are not protected by the SSCRA, they may receive protection under a comparable state statute, such as that enacted in Louisiana.[10]

Are reservists attending weekend and annual two-week training covered by the SSCRA? Although the SSCRA does not clearly cover this situation,[11] a legal assistance attorney (LAA) could cite the dicta in *Mouradian v. John Hancock*[12] and argue that they should be protected.

In many instances dependents are covered,[13] either derivatively,[14] or in their own right.[15] But what if, for example, the problem for which a dependent spouse seeks relief occurred before the marriage and before the dependent's spouse had entered military service? Interestingly, in *Tuscon Telco Federal Credit Union v. Bowser,*[16] the court held that the SSCRA would provide relief to the dependent under some circumstances.[17]

Has My Client Waived the SSCRA Protection?

Pursuant to 50 U.S.C. Appendix § 517, persons may waive protection *if* the waiver is in writing, executed after the effective date of SSCRA coverage,[18] and in an instrument separate

---

[7] An excellent discussion of this issue is found in Lieutenant Colonel (then Major) Pottorff's article, *supra* note 6, at 115.

[8] 50 U.S.C. App. § 511 (1990).

[9] Whether the service member voluntarily or involuntarily entered active federal service is immaterial.

[10] LA. REV. STAT. §§ 401-425, Louisiana Military Service Relief Act (West 1993).

[11] The term "person in the military service" includes "federal service on active duty with any branch of service heretofore referred to . . . ." 50 U.S.C. App. § 511 (1990); "and any member of a reserve component of the Armed Forces who is ordered to report for military service shall be entitled to such relief and benefits . . . ." *Id.* § 516. Proposed revision to the SSCRA—H.R. 4763 (1992) which did *not* pass Congress—contained the following: Section 101(3) the term "military service" means active federal service . . . . (4) the term "active service" means military service other than for training. (*Note:* the SSCRA now in effect does *not* contain such a limiting definition).

[12] 1989 WL 225052 (1st Cir. 1989), *remanded,* 751 F. Supp. 272 (D. Mass. 1990), *aff'd,* 930 F.2d 972 (1st Cir. 1991). Though the circuit court in 1989 did not specifically rule on the issue, it stated that a reservist plaintiff who argued that the statute of limitations should be tolled for the weekends and two-week period he spent training may have been covered by the SSCRA. On remand, the district court sidestepped the issue by stating that another statute of limitations—the armed services tolling provision in the Labor Management Relations Act which required a showing of material effect—applied in this collective bargaining case, instead of the general tolling provision of the SSCRA. Affirming in 1991, the circuit court said that the choice of which statute of limitations to apply would be dispositive in the case, because *if* the SSCRA applied, then the appellant would get relief.

[13] The SSCRA does not define the term "dependent." *See* Patrikes v. J.C.H. Service Stations, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. City Ct. 1943), *aff'd,* 180 Misc. 927, 46 N.Y.S.2d 233 (N.Y. App. Div. 1943), *appeal denied,* 266 A.D. 924, 44 N.Y.S.2d 472 (N.Y. App. Div. 1943) (dependent is one who looks to service member for support and maintenance for the reasonable necessities of life—business partner does not fall within that category); Reid v. Margolis, 181 Misc. 222, 44 N.Y.S.2d 518 (N.Y. Sup. 1943) (parents were dependents under case circumstances). See also Balconi v. Dvascas, 133 Misc. 2d 686, 507 N.Y.S.2d 788 (N.Y. Civ. Ct. 1986) (ex-wife considered a dependent due to circumstances and received SSCRA protection).

[14] 50 U.S.C. App. § 513 (1990) provides derivative protection for those with joint liability with a service member and applies any provision that stays, suspends, or postpones an obligation. For example, a dependent who is jointly liable with the service member on a financial obligation could invoke the SSCRA six percent interest cap of § 526 (provided certain criteria are met which will be discussed *infra*).

[15] *Id.* § 536. Dependents receive Article III benefits—§§ 530-536—in their own right:

> Dependents of a person in military service shall be entitled to the benefits accorded to persons in military service under . . . [sections 530 to 536 of the Act] . . . unless [the court finds that] the ability of the dependent to comply with terms of obligation, contract, lease, or bailment has not been materially effected by reason of the military service of the person upon whom the applicants are dependent.

For example, a dependent who is solely liable on an installment contract for the purchase of a car bought before the service member entered active duty would receive protection against repossession without court order if military service materially affected the dependent's ability to meet the obligation *Id.* § 531.

[16] 451 P.2d 322 (Ariz. App. 1969). In this case, a woman entered a chattel mortgage on a car and subsequently married a civilian who later was drafted. The car was registered solely in her name and she alone made payments before repossession. The court held that repossession without a court order violated 50 U.S.C. App. § 532. The SSCRA applied because her ability to pay was impaired by her husband's subsequent induction.

[17] Would the woman in *Tuscon Telco Federal Credit* have been able to invoke the six percent interest cap pursuant to § 526? No, because she was not "jointly" liable on the note with her military husband. Recall that only Article III protections apply to dependents "in their own right." If she had been jointly liable before her husband entered military service, however, she could have invoked § 526.

[18] 50 U.S.C. App. § 511 (1990) provides that active duty personnel receive SSCRA protection from the date of entering active service to the date of discharge. Section 516 provides that reservists receive Article I through III protections (see §§ 510-517, 520-527, 530-536) from the date they receive orders to active duty (see SSCRA Amendments, *supra* note 5, Pub. L. 102-12, § 9(5) (1990)) and all SSCRA protections on reporting for active duty.

from the obligation or liability. A waiver of a particular SSCRA protection does not deprive a covered person of other protections available under the SSCRA.[19] When the waiver was given is important. For example, if a reservist attempted to waive Article III protections[20] before receiving orders for active duty in hopes of negotiating a more favorable settlement with a creditor, that waiver would be ineffective.[21]

What Are the Jurisdictional Limits of the SSCRA?

The SSCRA applies in all federal, state, and territorial civil[22] courts.[23] The SSCRA does not empower federal courts, however, to collaterally review, vacate, or impede state court decisions.[24] For example, assume a client is having his or her wages garnished by a state court for child support and the client contends that the court entered the judgment without his or her presence at the proceedings in violation of 50 U.S.C. Appendix § 521.[25] Could the client seek an injunction in federal court to preclude the Defense Finance and Accounting Service (DFAS) from garnishing his or her wages until the client could reopen the default judgment at the state level? The First Circuit in *Scheidigg v. Department of the Air Force*,[26] said no.[27]

Under What Circumstances May a Client Invoke the Six Percent Interest Cap Provisions of the SSCRA?

Many SSCRA protections require a showing that military service materially affected the service member's (or other protected person's) ability to appear and defend in the civil action or otherwise meet the obligation.

Title 50 United States Code Appendix § 526 prohibits creditors from charging in excess of six percent on all indebtedness incurred prior to active duty *unless* the court finds no "material effect."[28] The burden is on the lender to seek relief from the court by proving that the military service did not materially affect the ability to pay the obligation.

What Constitutes "Material Effect?"

Assume that a reservist who is called to active duty (thereby decreasing his or her income) liquidates assets and savings to pay an obligation while attempting to convince a lender to reduce the interest rate to six percent. Could the lender legitimately argue that because the reservist was able to meet the payments (regardless of the source of income), service did not materially affect the military member's ability to pay at the higher interest rate? This is an example of when the LAA should use the "intent" of the SSCRA[29] in arguing that § 526 does not require service members to deplete all forms of assets before invoking its protection.

What if a married person joins active service and although his or her income increases, because the nonmilitary spouse is forced to quit his or her job to accompany the active duty spouse, the couple's joint income decreases? Could they

---

[19] *See* Harris v. Stem, 30 So. 2d 889 (La. Ct. App. 1947) (military member waived requirement for court proceedings prior to repossession and sale of auto in event of default. This did not deprive him of invoking statute of limitations tolling provision in later action against lender for damages).

[20] 50 U.S.C. App. §§ 530-536 (1990).

[21] In just such an unreported case, Search v. Fenster (Fla. 7th Cir., 12 Nov. 1992), a Florida state court declined to find a valid waiver. An officer in the reserves who thought that he did not have SSCRA protection purported to waive any protection he might have had hoping to enhance his bargaining position. Because of the 1991 SSCRA amendments, he had Article III protections on receipt of orders to report for active duty (SSCRA Amendments, *supra* note 5, substituted "a reserve component" for "the enlisted Reserve Corps," in § 516).

[22] 50 U.S.C. App. § 510 (1990) indicates that the SSCRA's purpose is to provide protection with respect to "civil liabilities." See Pottorff, *supra* note 6, at 121 for discussion.

[23] 50 U.S.C. App. § 512 (1990). Regarding application to statutes of limitation to courts and other proceedings, see *id.* § 525; regarding criminal bail bonds, see *id.* § 513.

[24] *See* Shatswell v. Shatswell, 758 F. Supp. 662 (D. Kan. 1991); *see also* Scheidigg v. Department of the Air Force, 715 F. Supp. 11 (D.N.H. 1989), *aff'd*, 915 F.2d 1558 (1st Cir. 1990).

[25] 50 U.S.C. App. § 521 (1990) provides for stays of proceedings when service materially affects the ability of service members to appear and defend or prosecute.

[26] *Id.* In this case, a lieutenant colonel sought declaratory and preliminary injunctive relief against the Air Force, his commanding officer, and his wife to preclude garnishment, pending the state court's final orders in the marital case. The lieutenant colonel argued that he was absent from court because of military service and cited the SSCRA. The court held that prohibiting the Air Force from continuing to garnish the lieutenant colonel's pay for child support until the lieutenant colonel was given a fair hearing in state court would interfere with the state court's writ of garnishment and was outside the district court's jurisdiction under the SSCRA. The SSCRA does not vest jurisdiction in a federal district court to vacate or impede an order or judgment of a state court or to interfere with the exercise by a state court of the jurisdiction conferred on it by the SSCRA. Judgments made in violation of the SSCRA are only voidable and do not violate due process. Judgments made in violation of the SSCRA are subject to attack only in the court which rendered the judgment.

[27] Legal assistance attorneys, however, should consider 50 U.S.C. App. § 523 (1990).

[28] The SSCRA does not specify what criteria should be used in determining material effect. Usually, a service member's preservice income as measured against his or her military income will suffice.

[29] 50 U.S.C. App. § 510 (1990).

invoke the six percent interest cap on joint obligations? The problem is one of "material effect." An LAA would find it difficult to argue on behalf of the service member—who is now receiving increased wages—that military service materially affected his or her income. Title 50 United States Code Appendix § 513, however, protects those not only primarily, but also secondarily, liable on the service member's obligation. The nonmilitary spouse who has lost his or her job could argue that the spouse's military service materially affected him or her. The creditor, on the other hand, may try to argue that because the military member's income has increased and because the spouse voluntarily gave up his or her former job, military service did not affect their income. Such a case calls for aggressive advocacy from an LAA who understands the purpose of the SSCRA.

What if, in the scenario just described, the nonmilitary spouse was not jointly liable? Title 50 United States Code Appendix § 536 only extends SSCRA benefits to dependents in their own right for §§ 530-536; other protections are derivative. Because the six percent interest limitations are located in § 526, only the service member could seek interest reduction on his or her obligations and it would be very difficult to convince a court of "material effect" when that person's income actually increased because of active duty.

Must the lender forgive interest in excess of six percent? The SSCRA is not specific, but legislative history supports the position that it must be forgiven.[30] In situations when lenders refuse to forgive excess interest—for example, by keeping monthly payments the same while applying more toward principal—LAAs should be resourceful in fashioning complaints citing not only SSCRA violations, but, where applicable, violations of other consumer protection statutes, such as state unfair and deceptive acts and practices statutes.[31]

Are Student Loans Subject to the Six Percent Interest Cap?

Student loans are *not* subject to the six percent interest cap. Title 20 United States Code § 1078(d) states that no provision of any law that limits the interest rate on a loan will apply to the Guaranteed Student Loan (GSL) program.[32] Other SSCRA provisions, including stays of proceedings[33] and reopening default judgments,[34] remain available to GSL debtors. Legal assistance attorneys also should remember that clients may be eligible for military deferments of student loans.[35]

Who May Request Delays of Court Proceedings Pursuant to the SSCRA?

Title 50 United States Code *Appendix* § 521 permits delay of civil[36] court proceedings where military service prevents a plaintiff or defendant in military service from asserting or protecting a legal right.[37]

---

[30] For an excellent discussion, see Pottorff, *supra* note 6, at 115.

[31] *See* Crump v. Chrysler First Financial Servs. Corp., No. 92 CVS 33 (Sup. Ct. Caldwell County, North Carolina, 1992) (case settled between parties). A reservist activated for Desert Storm requested reduction of a real estate loan to six percent. The lender reduced the interest rate but did not reduce the monthly payments. Although the reservist continued to make monthly payments, the reservist missed the balloon payment that was due after her call to active duty and the lender reported a series of delinquencies to a credit reporting agency. Unable to obtain other low-cost financing because of the resulting bad credit report, the reservist refinanced with same lender at an interest rate of 15%, higher than that normally extended to consumers. The reservist's lawyer alleged violations of the SSCRA for failing to reduce the interest rate to six percent, the Fair Credit Reporting Act, for willful and malicious conduct by reporting delinquency, and the North Carolina Unfair Trade Practices Act, for fraudulent, deceptive, and misleading practices. The case was settled; the 15% refinancing loan was recomputed at 12% and the lender was to clear the reservist's credit report and to pay her $6000.

[32] Guaranteed Student Loans are now called Stafford Loans, Supplemental Loans for Students (SLS), and PLUS Loans. Memorandum, Department of Education (DOE), to Office of the Staff Judge Advocate, Camp Lejeune, North Carolina (1 Apr. 1993) [hereinafter DOE Memo]. The SSCRA interest limitation does not apply to the Federal Family Education Loan Program (FFELP) loans made under Part B of the Higher Education Act (HEA), as amended. 20 U.S.C. § 1078(d) (1992). The FFELP includes four types of student loans: Federal Stafford Loans (formerly GSL); Federal Supplemental Loans for Students (SLS); Federal PLUS loans; and Federal Consolidation Loans. A loan with an interest rate greater than the statutory limit outlined in 20 U.S.C. § 1077(a) is not considered a loan insured under Part B of the HEA and would not be excluded from coverage under the SSCRA by 20 U.S.C. § 1078(d). Some guarantor agencies also operate state or private loan programs that are not subject to the HEA and which would be covered by the SSCRA. For more information write to: United States Department of Education, Office of the General Counsel, 400 Maryland Ave., S.W. Washington, D.C. 20202-2110 Attn: Mr. Brian Siegel, Attorney, Division of Postsecondary Education.

[33] 50 U.S.C. App. § 521 (1990).

[34] 50 U.S.C. App. § 520 (1990).

[35] Deferments: Higher Education Amendments of 1992, Pub. L. 102-325, 106 Stat. 448 (1992) significantly changed deferments available to borrowers under the FFELP. Under 20 U.S.C. § 1078(b)(1)(M), as revised, an automatic deferment for military personnel no longer exists. Borrowers receiving loans on or after 1 July 1993 are entitled only to deferments on limited grounds (for the military the most likely ground to use is economic hardship). The DOE is developing regulations to implement provision; see DOE Memo, *supra* note 32.

[36] Pottorff, *supra* note 6, at 121. "While § 521 does not expressly limit its application to civil proceedings, § 510 indicates the purpose of the SSCRA is to provide protection with respect to 'civil liabilities.' Accordingly, courts have not applied the SSCRA to stay criminal proceedings." *Id.* (citing Dotseth v. Arizona, 427 P.2d 558 (Ariz. Ct. App. 1967)).

[37] "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, ..." 50 U.S.C. App. § 521 (1990).

Assume a civilian plaintiff's or defendant's attorney is called to active service. May the civilian invoke protection and request a stay until the attorney can appear and represent him or her? The court in *Salazar v. Rahman*[38] determined that § 521 applies only to parties in a civil proceeding and does not provide for a stay based on an attorney's military service. What about a material witness who, because of military service, cannot appear for the proceedings? Again, the civilian plaintiff or defendant could not rely on § 521.[39]

May a service member request a stay of proceedings pursuant to § 521 in a situation where the member is "technically" neither a plaintiff nor a defendant? Perhaps. A recent bankruptcy case, *In re Ladner*, allowed a debtor service member to postpone a debtor-creditor meeting that required his presence.[40]

If a Court Finds "Material Effect," Must It Grant a Delay of Proceedings Until the Service Member Can Appear and Prosecute or Defend?

Title 50 United States Code Appendix § 521 provides that if the court finds that a material effect existed, the court must order a stay. The problem arises when the court determines that despite material effect, the presence of the service member is not necessary to the proceeding, in which case no stay is granted. For example, in cases involving temporary modifications of child support, stays generally are not granted.[41] The facts of each case determine whether a trial court has abused its discretion in refusing a stay request.[42] Therefore, LAAs carefully must consider the possible consequences if their clients fail to appear for cases in which a court is likely to proceed without them.[43]

Procedural Steps in the SSCRA That a Plaintiff Must Take to Secure a Default Judgment Against a Military Member

Pursuant to 50 U.S.C. Appendix § 520, if a default of any appearance by the defendant occurs, before the plaintiff can obtain a default judgment, the plaintiff must submit an affidavit stating whether the defendant is, or is not, in the military or that the plaintiff does not know whether the defendant is in the military service. The court must appoint an attorney when the defendant is in the service and does not have an attorney present in court or when the plaintiff does not know whether the defendant is in the service. The court appointed attorney has the responsibility to determine whether the defendant is in the military and, if so, typically to request a stay of the proceedings on the defendant's behalf.[44]

What is the effect of failing to file an affidavit? No entry of judgment should occur unless the court so orders after ascertaining whether the defendant is in the military service and whether the defendant has requested a stay of the proceedings.[45] A judgment obtained without the affidavit is

---

[38] 1993 WL 22085 (Tex. Ct. App. 1993).

[39] Ohio v. Gall, 1992 WL 217999 (Ohio App. 1992) ("party" does not include a material witness).

[40] *In re* Ladner, 264925 1993 WL (Bankr. D. Colo. July 15, 1993). "The purpose of the (SSCRA) require(s) a liberal interpretation of the word defendant." (citing Shire v. Superior Court In and For Greenlee County, 162 P.2d 909 (Ariz. 1945)). The court said that the phrase referencing the appearance of the individual as either plaintiff or defendant should not be strictly construed but should apply to those who are "petitioners, respondents, movants, or intervenors." The time for filing claims against the debtor, for filing objections to exemptions, and for filing complaints against debtor, would continue to run from date of debtor's first appearance at meeting of creditors.

[41] *See* Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989). As a general rule, temporary modifications of child support do not materially affect the rights of military defendants because they are interlocutory and subject to modification; *see also* Bubac v. Boston, 600 So. 2d 951 (Miss. 1992) (military father not necessary party in proceeding by mother challenging retention of children by paternal grandmother); Jackson v. Jackson, 403 N.W.2d 248 (Minn. Ct. App. 1987); Nurse v. Portis, 520 N.E.2d 1372 (Ohio Ct. App. 1987).

[42] Williams v. Williams, 552 So. 2d 531 (La. Ct. App. 1989).

[43] 50 U.S.C. App. § 520 (1990). That section allows a service member the opportunity to reopen default judgments provided that the service member can show material effect and a legal or meritorious defense. If a court already has concluded that the presence of the service member was not necessary to the original proceeding, then it may be unlikely that the same court will find a legal or meritorious defense when the defendant petitions to reopen the judgment.

[44] An interesting case is Wakefield Mortgage Co. v. Keller, No. 02C01-9204-CP-291 (Ind. Cir. Ct. 1992) where the court found the following:

> [H]aving reviewed Plaintiff's application or appointment of attorney for defendant . . . due to his military service . . . [order] that The Judge Advocate General [of the Army] be appointed as the attorney for [PFC Keller] . . . [and confirm] whether or not [Keller] is in active military service . . . . [TJAG] is empowered to act on behalf of [Keller] . . . in such a manner as to equitably conserve the interests of all parties [if Keller's ability to comply with the mortgage obligation] has not been materially effected by reason of his military service and the real estate appears to be abandoned.

Note: The Judge Advocate General's School forwarded the court order to the Office of The Judge Advocate General, for response to the court on behalf of The Judge Advocate General.

[45] *See* United States v. Hoag, 1992 WL 474651 (N.D. N.Y. Dec. 18, 1992) (In trying to recover tax monies mistakenly refunded Hoag, the United States failed to file an affidavit as required by the SSCRA; the court declined to enter default judgment). *But see* Chenausky v. Chenausky, 509 A.2d 156 (N.H. 1986). "Appearance" obviating need for plaintiff's affidavit regarding military service is not necessarily the same as an "appearance" for the purpose of appointment of counsel. In *Chenausky*, the soldier filed his own responses setting out the facts disputing permanent modification of child support. The soldier did not appear personally or through counsel. Consequently, the court entered a default judgment and ordered garnishment for arrearages. The soldier's response made the plaintiff's affidavit unnecessary. The purpose of § 520 is to protect a service member who has no knowledge of the proceedings. A soldier's duties, however, may hinder conduct of his or her defense to require appointment of counsel when the soldier does not personally appear or have representation.

voidable upon the defendant's showing that presentation of a legal or meritorious defense was prejudiced by his or her military service.[46]

What is the effect of failing to appoint an attorney for the defendant? Failure of the court to appoint an attorney for the defendant, without more,[47] does not require reversal.[48] Legal assistance attorneys should remember that default judgments rendered in violation of the SSCRA are merely voidable, not void.[49]

Who pays the court-appointed attorney? The SSCRA does not address this question, however, several cases have determined that the plaintiff, or an estate in a will contest, bears the cost.[50]

If a Client has a Default Judgment Rendered Against Him or Her, May the Judgment Creditor Secure Garnishment or Involuntary Allotment of the Service Member's Wages?

Perhaps. The Hatch Act Reform Amendment of 1993[51] was signed by the President on 6 October 1993.[52] Section 9 of the Act will allow garnishment of federal wages in the same manner as nonfederal wages for all purposes allowed by state and local law.[53] The military will promulgate regulations to implement the intent of the Act. The regulations shall include, however, a mechanism for "competent authority" to consider whether the judgment was rendered in compliance with the procedural requirements of the SSCRA and whether the service member was absent from the court proceedings because of military duties.[54]

---

[46] In speaking with numerous reserve attorneys on common practices in the civilian court system, the author learned that many attorneys fail to file the required affidavit or routinely state that the defendant is not in the military, when the plaintiff does not know.

[47] To reopen a default judgment, the service member also must show that he or she could not be present in court to conduct a defense because of military service (material effect). The service member must reveal a defense to all, or part, of the original cause of action.

[48] *See* Smith v. Davis, 364 S.E.2d 156 (N.C. Ct. App. 1988). The trial court's failure to appoint an attorney for the soldier, without more, did not require reversal, but the soldier was entitled to reopen the default judgment because he had shown that his military service materially affected his ability to defend and that he had a meritorious defense; *see also* Ostrowski v. Pethick, 590 A.2d 1290 (Pa. Super. Ct. 1991) (judgment valid until properly attacked by service member). *But see* Wilson v. Butler, 584 So. 2d 414 (Miss. 1991) (although the plaintiff had failed to file required affidavit of military service and lower court had failed to appoint an attorney for defendant, as required by the SSCRA, the judgment would not be reopened because the soldier failed to show existence of a meritorious defense to paternity action).

[49] *Ostrowski,* 590 A.2d at 1290.

[50] *See* Barnes v. Winford, 833 P.2d 756 (Colo. App. 1991) (cert. denied Aug. 3, 1992) (costs payable by plaintiff). Redford v. Ramlow, 27 N.W.2d 754 (Wis. 1947), *reh'g denied,* 28 N.W.2d 884 (Wis. 1947) (in will contest, court appointed attorney paid from estate just like guardian ad litem is paid).

[51] The Hatch Act Reform Amendments passed the Senate on 20 July 1993 (S. 185, sect. 9, amend. No. 568—pertaining to garnishment and involuntary allotments for military personnel) 139 CONGR. REC. S8950-04, D803-02 (daily ed. July 20, 1993). For text of the Senate version, see 139 CONGR. REC. S9169-03 (daily ed. July 21, 1993). On 21 September 1993, the House passed the Senate version of the bill (H.R. 20—formerly the Federal Employees Political Activities Act of 1993. 139 CONGR. REC. H6813-01 (daily ed. Sept. 21, 1993). Whether the House bill allows "garnishment" of military wages remains unclear. When the original Senate amendment was introduced, the proponents—Senators Pryor and Craig—made it obvious that their intent was to exempt military personnel from formal garnishment proceedings and instead to allow the military to use involuntary allotments to satisfy valid court orders. 139 CONGR. REC. S8692-01 (daily ed. July 14, 1993). During debate on the House bill, however, a representative stated that "while permitting the garnishment of the pay of uniformed personnel, the bill includes special protection for service members in circumstances where their military duty precludes their presence at the garnishment proceeding." 139 CONG. REC. H6813-01 (Sept. 21, 1993). Regardless, it is anticipated that the military would process garnishment orders in the same manner as involuntary allotments.

[52] Pub. L. No. 103-94, § 107, Stat. 1001. The Hatch Act Reform Amendments shall take effect 120 days after the date of enactment (with limited exceptions).

[53] Presently, military wages may be garnished only for child support and alimony obligations. 42 U.S.C. § 659 (1993).

[54] The Hatch Act Reform Amendments included the following:

> No later than 180 days after the date of the enactment of this Act, the Secretaries . . . shall promulgate regulations to carry out the purposes of this section with regard to members of the uniformed services. Such regulations shall include provisions for the involuntary allotment of pay of members of the uniformed services for indebtedness owed a third party as determined by the final judgement of a court of competent jurisdiction, and as further determined by competent military or executive authority to be in compliance with the procedural requirements of the Soldiers' and Sailors' Civil Relief Act; and consideration for the absence of a member of the uniformed service from an appearance in a judicial proceeding resulting from the exigencies of military duty.

139 CONGR. REC. S8692-01 (daily ed. July 14, 1993); 139 CONGR. REC. H6813-01 (daily ed. Sept. 21, 1993).

Which military officials will be involved in drafting the regulations has not yet been decided, but the Chiefs of Legal Assistance for each service are discussing areas of concern that should be addressed. Discussion with Commander McMahon, Chief, Legal Assistance, Navy (Sept. 29, 1993) [hereinafter Discussion].

The ramifications of this legislation for legal assistance clients should be obvious. Creditors will be much more likely to sue military members over heretofore virtually uncollectible debts. Legal assistance attorneys should consider this when negotiating on behalf of their clients.[55] Also, if the client is notified that an involuntary allotment is being instituted to satisfy a commercial debt, LAAs may become involved in helping the client prepare a response to the applicable finance center, particularly where there was a default judgment or where it appears that the SSCRA was violated during the underlying court proceedings.[56]

What if, Because of Military Service, a Client Cannot Afford to Pay a Judgment?

Title 50 United States Code Appendix § 523 provides that, unless no material effect is found to exist, the court may stay execution of any judgment or order entered against the service member, and vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment.[57] This protection should not be overlooked, especially when a default judgment has been entered against a service member and military service has materially affected the member's ability to comply. Another example provides that a service member could invoke § 523 in requesting a modification of child support or alimony, depending on the circumstances.[58]

What if, Because of Military Service, a Client Cannot Afford to Meet Obligations or Other Liabilities Incurred by Him or Her Prior to Active Service?

The client may invoke 50 U.S.C. Appendix § 590 which provides that persons may, at any time during military service or within six months thereafter, apply to the court for relief of any obligation or liability incurred by such person prior to active service or in respect to any tax or assessment whether falling due prior to, or during, active military service. The court may grant stays of enforcement during which no fine or penalty shall accrue if service materially affects the ability to comply with the obligation or pay the tax or assessment. No default or legal action needs to be pending to get protection, but the applicant must prove "material effect."[59] This section contemplates liabilities incurred *by* service members, *not* judgments rendered against them before they entered active service.[60]

Could several SSCRA protections apply in a situation like this? Perhaps. For example, suppose the client requests interest rate reduction—pursuant to § 526—of a preservice installment contract for the purchase of property. Despite the decreased payments, the client is still unable to meet the payments because of military service. The client could request a stay of enforcement of the obligation under § 590. Suppose the creditor terminates the contract because the service member failed to pay. Section 531 would prohibit termination and repossession without court order.[61]

May a Client Use the SSCRA to Terminate a Rental Agreement?

Title 50 United States Code Appendix § 534 allows lawful termination of preservice leases of premises by a service member entering active duty [or by his or her dependent in their own right].[62] The protected person need not show "material effect," only that the lease was entered into prior to active duty, that the lease was executed by, or on behalf of, the service member, and that the premises were occupied for

---

[55] The Chief of Navy Legal Assistance, Commander K.P. McMahon has issued an electronic mail memorandum, subject: Legal Assistance Practice Advisory 11-93: Congress OK's 'Involuntary Allotments' of Military Debtors, (Sept. 1993), alerting Navy LAAs of the legislation and suggesting that LAA negotiating skills are the key to helping clients in this area.

> Creditors are usually happy to work with someone who demonstrates a willingness to resolve the debt—amounts owed can be compromised, loans "restructured," repayment plans established, and voluntary allotments used to provide the creditor with regular assured payments. The key for many creditors is quick recovery—they may be willing to accept less if they can get it now.

Id.

[56] Discussion, *supra* note 54.

[57] The judgment, order, attachment, or garnishment of property, money, or debts in the hands of another must have resulted from an action or proceeding commenced in a court before or during the period of active service or within 60 days thereafter.

[58] See McGlynn v. McGlynn, 178 Misc. 530, 35 N.Y.S.2d 6 (Sup. Ct. 1942) (service member could request modification of child support or alimony); McKinney v. McKinney, 182 Misc. 903, 50 N.Y.S.2d 8 (Sup. Ct. 1944) (husband initiated a proceeding to determine extent of his support obligation because of his change in circumstances when entered active duty).

[59] Application of Marks, 46 N.Y.2d 755 (1944). Dependents receive derivative protection as well, Morris Plan Indus. Bank of N.Y. v. Petluck, 60 N.Y.2d 162 (1946).

[60] See 50 U.S.C. App. § 523 (1990).

[61] *See* Hanson v. Crown Toyota Motors, Inc., 572 P.2d 380 (Utah 1977) (bank, with knowledge of Hanson's military status, repossessed auto and sold it without first filing a lawsuit, thus violating § 531). Could a service member who leased an automobile prior to military service use § 531 to cancel the lease because the service member received orders for overseas assignment? No. Although this provision prohibits creditors from terminating certain contracts, it does not allow military members to cancel the agreements (but see § 590 on requests for stays of enforcement of obligations). If the lessor of the automobile seeks to repossess based on the service member's breach, does this section apply? Contract to lease must be with "view to purchase," therefore, whether § 531 will apply depends on the contract.

[62] *See* 50 U.S.C. App. § 536 (1990).

dwelling, professional, business, or other similar purposes by the service member or the service member and his or her dependents.

If a preservice lease was signed only by the nonmilitary spouse, could he or she terminate the lease? Arguably, yes.[63]

What if the nonmilitary person signed the lease before marrying a person who enters military service? Could the nonmilitary spouse terminate the lease? Arguably, yes, relying on the *Tuscon Telco Federal Credit Union v. Bowser* case.[64]

If the service member or dependent enters a lease for premises *after* entering active service, may he or she terminate under provisions of § 534? No. To terminate, the lease must provide for such termination or there must be a governing state statute containing a "military clause"[65] (or the tenant may negotiate with the landlord).[66]

Assuming that the service member may terminate the lease, does the lessor have any recourse for expenses incurred in preparing the premises for occupancy by that tenant? Title 50 United States Code Appendix § 534 provides that prior to the termination period provided in that section, the lessor may apply to the court for equitable relief. For example, a lessor who modifies an office at substantial cost to accommodate a reserve doctor who later is called to active duty could request monetary relief in exchange for terminating the lease.[67]

Do Statutes of Limitations Run Against Service Members While They Are on Active Duty?

Section 525 tolls the running of statutes of limitations during the service member's period of military service with respect to any administrative or civil proceeding (except with respect to any period of limitation under the Internal Revenue Service laws) involving a service member (this includes heirs, executors, administrators, or assigns) as either plaintiff or defendant.[68]

Does "heir, executor, administrator or assign" include the United States when the service member at fault is acting within his or her scope of employment? The Fourth Circuit in *Carr v. United States*, said no.[69]

Are the statutes of limitations tolled for the entire period of military service, even if the person is "career?" Must the service member show "material effect" to get protection? While the SSCRA does not limit application of this provision to a single term of enlistment or to a specified period of career service, lower courts had interpreted this provision various ways with some requiring a showing of material effect for career personnel to invoke protection. On 31 March 1993, the Supreme Court settled the issue in *Conroy v. Aniskoff*.[70] No requirement to show material effect exists.

Does the tolling provision apply to all administrative and court proceedings? Section 525 says it applies to "any action

---

[63] *Id.*

[64] *See* Tuscon Telco Fed. Credit Union v. Bowser, 451 P.2d 322 (Ariz. Ct. App. 1969).

[65] Delaware (DEL. CODE ANN. tit. 25 § 5509 (1991)); Georgia (GA. CODE ANN. § 44-7-37 (1982 & Supp. 1990)); Idaho (IDAHO CODE § 55-2010) (1989)); Kansas (KAN. STAT. ANN. § 58-2504,2570 (1990)); Maryland (MD. REAL PROP. CODE ANN. § 8-212.1 (1991)); North Carolina (N.C. GEN. STAT. § 42-45 (1984 & Supp. 1991)); Virginia (VA. CODE ANN. § 55-248.21:1) (1991)). Some states have statutory protection for service members under state versions of the SSCRA: Missouri (MO. REV. STAT. SB 358 § 2.1, approved 12 June 1991)); New Jersey (N.J. REV. STAT. 38: 23C-15 (1991)); New York (N.Y. MIL. §§ 310, 311 (1992)); Pennsylvania (PA. CONS. STAT. ANN. §§ 7311-7314 (1993)); Louisiana (LA. REV. STAT. §§ 401-25 (West 1993). Some states have military clauses for mobile home rentals: Arizona (ARIZ. REV. STAT. § 33-1413 (1991)); Connecticut (CONN. GEN. STAT. § 21-82(11) (1990)); Delaware (DEL. CODE. ANN. §§ 7007, 7012 (1991); Idaho (IDAHO CODE § 55-2010 (1991)); Rhode Island (R.I. GEN. LAWS § 31-44-7(10) (1991)); Washington (WASH. REV. CODE § 59.20.090 (1990)).

[66] On 1 January 1993, H.R. 552 was proposed to amend § 534 of the SSCRA to provide relief for service members who execute leases while in service and receive unanticipated new orders. The bill was referred to the Committee on Veterans' Affairs on 21 January 1993.

[67] This scenario occurred during Desert Storm. A reserve doctor leased an office which the lessor modified at substantial costs to meet the doctor's needs. The doctor was activated by the Public Health Service and canceled his lease pursuant to § 534. The lessor countered to recover costs lessor incurred in modifying the office. The case is currently pending.

[68] 50 U.S.C. App. § 527 (1990).

[69] 422 F.2d 1007 (4th Cir. 1970). The Federal Tort Claims action was untimely. Because the Federal Drivers Act immunized the Navy driver, the plaintiff (federal employee) had no action against "any person in military service" and because the government was not considered an "heir, executor, administrator, or assign" of the sailor, the statute of limitations had not tolled.

[70] 1993 WL 89113 (S. Ct. 1993), *rev'g* Conroy v. Danforth, 599 A.2d 426 (Me. 1992). The Maine court affirmed the judgment that the SSCRA did not protect an Army colonel on active duty from running of 18-month redemption period following statutory foreclosure of a tax lien mortgage for nonpayment of taxes. The court ruled that career service members must prove material effect to toll redemption period, despite the language of the statute that does not require a showing of material effect. The Supreme Court held, however, that the SSCRA language is clear: there is no requirement to show service materially effects service member.

or proceeding in any court, board, bureau, commission, department, or other agency of government . . . ." Despite the literal language of the SSCRA, however, and even after the *Conroy* case, jurisdictions differ on whether § 525 tolls statutes of limitations for all, or just some, administrative and civil proceedings involving service members, particularly when another statute containing time limitations also applies in the case.[71]

Keeping in mind that the purpose of the SSCRA is to postpone or suspend certain civil obligations to permit service members to devote their full attention to duty,[72]LAAs should remember that in many instances, the SSCRA is open to interpretation. Relying on the oft-quoted language of *Le Maistre v. Leffers*,[73] that the SSCRA should be read "with an eye friendly to those who dropped their affairs to answer their country's call," LAAs can be very persuasive in negotiating "gray area" issues.[74] Major Hostetter.

Testamentary Transfers Using UGMA or UTMA

Legal Assistance Attorneys are tasked with assisting clients in preparing wills and Servicemen's Group Life Insurance (SGLI) beneficiary designations.[75] If a minor is named outright as a beneficiary under a will or a life insurance policy, the payment will be made to a designated guardian. A formal guardianship may not be the most desirable way to handle a minor's property.[76] Alternatives exist, however, to guardianship.

One of these alternatives is a custodianship under the Uniform Gifts to Minors Act (UGMA) or Uniform Transfers to Minors Act (UTMA) as adopted by the various states. The custodianship is established by language such as the following: "[Name of custodian], as custodian for [name of minor beneficiary], under the [name of enacting state] Uniform [Gifts or Transfers] to Minors Act."[77] But how is an LAA, who likely will assist soldiers from all over the country, to know which states have enacted a variation of the UGMA or UTMA that allows for the particular testamentary transfer in issue? This note summarizes the current status of state law with regard to UGMA/UTMA testamentary transfers.[78]

The original UGMA, completed in 1956, applied only to the transfer of securities, and a custodianship under the 1956 Act was limited to inter vivos transfers.[79] The UGMA was revised in 1966, and the revised UGMA expanded the defini-

---

[71] *See* Allen v. Card, 799 F. Supp. 158 (D.C. 1992) (pre-*Conroy* case). The SSCRA does not toll the three-year period for filing complaints with the Board for Correction of Military Records (BCMR). "Plain meaning of statute cannot be relied upon when it would yield clearly unintended result and there is clear evidence that this is not what Congress intended." *Id.* When two statutes conflict, the more specific and recent one controls—here, the BCMR's statute of limitations superceded the SSCRA because it was more specific and recent; Miller v. United States, 1993 WL 315025 (Fed. Cl. Aug. 13, 1993) (post-*Conroy* case). Failing to mention *Conroy* in its opinion, the claims court agreed with *Allen,* finding that the SSCRA tolling provision does not apply to actions before the BCMR, because to do so would have the opposite effect of that intended by Congress in enacting the SSCRA. The purpose of the SSCRA, in the court's opinion, was to protect service members from "civil liability" that might arise during their military service, not to weaken the military by limiting its "discretion to conduct its internal affairs;" (for a more complete discussion of *Miller,* see Hostetter, *Does the SSCRA Toll Statutes of Limitation for All Proceedings?,* ARMY LAW., Oct. 1993 at 35); *see also* Mouradian v. John Hancock, 1989 WL 225052 (1st Cir. 1989), *remanded,* 751 F. Supp. 272 (D. Mass. 1990), *aff'd,* 930 F.2d 972 (1st Cir. 1991) (the armed services tolling provision in the Labor Management Relations Act, which required a showing of material effect, applied in this collective bargaining case, instead of the general tolling provision of the SSCRA). *But see* Davis v. Department of the Air Force, 51 M.S.P.R. 246 (1991) (time for filing employee's appeal to Merit Systems Protection Board tolled during his military service pursuant to § 525, citing Stemmer v. Department of the Army, 3 M.S.P.R. 352 (1980)); *see also In re* Robins Co., Inc. v. Dalkon Shield Claimants Trust, 1993 WL 217492 (4th Cir. June 22, 1993) (post-*Conroy* case) In *Robins*, the court held the following:

> Plain language of [SSCRA] requires that time periods such as that fixed by the bar date [for filing claims against A.H. Robins as part of the Chapter 11 reorganization plan] be tolled in favor of military personnel . . . . the statute on its face applies to toll the claim filing period in favor of Major Anderson. [It] contains no exceptions and is drafted in extraordinarily broad terms . . . . section 525 itself contains no hint of an exception for bankruptcy or any other type of proceeding . . . .

[72] 50 U.S.C. App. § 510 (1990).

[73] 333 U.S. 1,6 (1948).

[74] Practitioners should rely on case law and, when applicable, argue to the court or opposing party the "intent" of the SSCRA when it is not clear whether their client is protected, but arguably could be.

[75] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 3-6b (30 Sept. 1992).

[76] Possible disadvantages include: the need for court intervention in the appointment of a guardian; court supervision of the guardian resulting in additional expenses of administration; and outright distribution of remaining proceeds to the minor at the age of majority (age 18 in many states).

[77] UNIFORM GIFTS TO MINORS ACT §2(a)(1), 8A U.L.A. 344 (West 1983) [hereinafter UGMA]; UNIFORM TRANSFERS TO MINORS ACT §3(a), 8A U.L.A. 458 (West Supp. 1993) [hereinafter UTMA].

[78] This note is not intended to provide a detailed comparison of the relative advantages and disadvantages of alternatives to guardianship. Note, however, that custodianships are usually less costly to operate than guardianships, and that, because custodianships are premised on "uniform" laws, a legal assistance attorney dealing with mobile clients may be more comfortable with custodianships than inter vivos trusts. This uncertainty when dealing with inter vivos trusts is heightened when dealing with mobile clients and mobile property.

[79] UGMA (1956 Act) §2(a), 8A U.L.A. 416 (West 1983).

tion of custodial property to include life insurance proceeds.[80] The UGMA was further revised in 1983 and renamed the Uniform Transfers to Minors Act. The UTMA provides for placement of a broad range of property interests[81] into custodianship, and adds trusts and estates—such as, "by will"[82]—as potential sources of custodial property.

Every state has adopted some form of the UGMA or UTMA.[83] Presently, one state (Michigan) is operating under a variation of the 1956 UGMA and seven states (Connecticut, Delaware, Mississippi, New York, South Carolina, Texas, and Vermont) are operating under variations of the 1966 UGMA. The remaining forty-two states and the District of Columbia have adopted variations of the UTMA.[84]

Every state which has adopted the UTMA provides for both testamentary transfers by will and by life insurance designation. But what about those eight states still operating under the more limited provisions of the UGMA?

There is good news with regard to life insurance: Michigan has amended[85] its 1956 UGMA to encompass life insurance, and, therefore, *all* states now allow for the designation of a custodianship as the beneficiary of life insurance proceeds. An LAA may use a custodianship for life insurance regardless of where the testator is domiciled or currently living.[86]

With regard to designations "by will," Connecticut, Delaware, New York, Texas, and South Carolina have amended[87] their UGMAs to include transfers by will. Out of the fifty states, therefore, only Michigan, Mississippi, and Vermont still do not recognize the will as a valid vehicle for establishment of a custodianship. So, unless the testator is domiciled in Michigan, Mississippi, or Vermont, the LAA can feel fairly confident that use of the UGMA or UTMA custodianship will be recognized by the probate court on the testator's death.[88]

Even if the testator is domiciled in one of the three "holdout" states, the LAA still might consider using the UGMA or the UTMA in the will. First, the testator may change his or her domicile, and the odds are that any change would take the testator into one of the forty-two UTMA states. Second, the UGMA states have been adopting the UTMA at the rate of two or three states every year,[89] so a significant possibility exists that Michigan, Mississippi, and Vermont will be UTMA states (or "amended UGMA" states) by the time the soldier passes on. Finally, in the unlikely event the custodianship fails, the probate court simply will fall back on the states' guardianship procedures, thus leaving the minor beneficiaries no worse off than they would have been without the attempt at custodianship. Major Peterson.

Contract Law Notes

The GAO Rejects Strict Interpretation of Government Mishandling Exception

The Federal Acquisition Regulation (FAR) provides that bids received in the office designated in the invitation for bids

---

[80] UGMA (1966 Act) §1(e), 8A U.L.A. 329 (West 1983).

[81] UTMA §1(6), 8A U.L.A. 453 (Supp. 1993).

[82] *Id.* § 5 at 453.

[83] UTMA, 8A U.L.A. 447 (Supp. 1993) (prefatory note).

[84] *Id.* table at 451; 20 PA. CONS. STAT. ANN. §§ 5301-20 (Supp. 1993).

[85] MICH. COMP. LAWS. ANN. § 554.452(a) (West 1980).

[86] The UTMA requires some minimal connection between the transfer and the nominated state before that state's UTMA will govern the transfer. Specifically, at the time of the transfer, either the transferor, the minor, or the custodian must be a resident of the nominated state, or the custodial property must be located in the state. UTMA § 2(a), 8A U.L.A. 457 (Supp. 1993). Because a "transfer" of life insurance occurs at the time of the beneficiary designation (*Id.* § 9(a)(3) at 457), a soldier can designate the UTMA of his or her state of residence, the UTMA of the custodian's state of residence, or the New Jersey UTMA (The Office of Servicemen's Group Life Insurance, and thus the "custodial property," are located at 213 Washington Street, Newark, NJ 07102).

[87] *See* CONN. GEN. STAT. ANN. § 45a-546(b) (Supp. 1992); DEL. CODE ANN. tit. 12, § 4502(b) (1987); N.Y. EST. POWERS AND TRUSTS LAW § 7-4.9 (McKinney); S.C. CODE ANN. § 20-7-160(1)(g) (Law. Co-op. 1987); TEX. PROP. CODE ANN. § 141.004(i) (West 1980), respectively.

[88] The testator still must decide which state's UGMA or UTMA to designate as the controlling law: the state of domicile or some other state? The most flexible situation exists where the state of domicile is an UTMA state. If the soldier dies domiciled in an UTMA state, the probate court will apply the UGMA or the UTMA of the state designated in the will if some connection or nexus exists between that state and the custodianship (*see supra,* note 86, discussion; UTMA § 2(c), 8A U.L.A. 457 (Supp. 1993)). If no nexus exists, the probate court will "save" the custodianship by establishing it under the local UTMA (UTMA § 21(2), 8A U.L.A. 485 (Supp. 1993)). The UGMA, however, does not contain nexus, conflicts of law, or savings provisions. If the state of domicile is an UGMA state, the probate court will find itself with little guidance on how to handle persons and property located in different states. Hence, for the sake of certainty, a testator domiciled in an UGMA state that provides for transfers by will is probably best advised to choose the domicile's UGMA as the law controlling the custodianship.

[89] In 1992, Nebraska, Pennsylvania, and Tennessee adopted the UTMA. In 1991, Washington and Alaska adopted the UTMA. In 1990, Georgia and Utah adopted the UTMA.

(IFB) after the exact time set for bid opening are "late bids."[90] The contracting officer may not consider a late bid sent through the mail unless the contracting officer receives the bid before contract award, and one of the exceptions to the usual "late is late" rule applies—the "five-day exception,"[91] the "two-day exception,"[92] or the "government mishandling exception."[93]

Government mishandling of bids typically occurs when an agency does not have reasonable internal delivery procedures, or does not adhere to its established procedures.[94] When a bidder asserts that its mailed bid is late because of government mishandling, the FAR provides that the government may consider the bid if the contracting officer determines that the late receipt of the bid was due "solely to mishandling by the government after receipt at the government installation."[95] The "only acceptable evidence" that the government may consider to establish the time of receipt at the installation is the "time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation."[96] Moreover, the consideration of the bid must not compromise the integrity of the government procurement system, which means that the bid must remain in the agency's exclusive possession after its receipt by the installation.[97]

In a recent decision, the General Accounting Office (GAO) determined that it would not strictly construe the FAR requirement for the government's mishandling to be the "sole" cause of a bid being late. The GAO allowed consideration of a late bid even though the bidder may have contributed to the mishandling.[98]

The Directorate of Contracting (DOC) at Fort Belvoir, Virginia, issued an IFB for maintenance of computer equipment, with a specified bid opening time of 1:30 p.m., December 2, 1992. At the time set for bid opening, the contracting office had received the bid of just one firm, Data General Corporation. Shortly thereafter, the Adjutant General's office delivered an envelope to the contracting office which contained the bid of Telos Field Engineering (Telos). Although the bid wrapper eventually was lost, the contracting officer determined that Telos' bid was late due to government mishandling. The contracting officer based his determination on the explanation provided by the installation postal officer (IPO), who stated that his office had received a certified envelope from the United States Postal Service on November 30, 1992, from Telos. The IPO recalled immediately logging his receipt of the envelope on a *Postal Service (PS) Form 3849*. The mail was not delivered to the contracting office until December 2, however, because the driver lacked an appropriate security clearance.

The protester, Data General Corporation, argued that the evidence was insufficient to prove that government mishandling was the "sole" cause of Telos' bid being late. Because the bid wrapper had vanished and the *PS Form 3849* did not indicate that the mail noted on it actually was sent by Telos, the protester contended that Telos must have contributed significantly to its bid's late arrival by failing to address its bid properly.

The GAO rejected the protester's argument, finding that it was based on a "literal interpretation of the word 'solely'" in the FAR. The GAO noted that such a literal interpretation would contravene the "letter and spirit of the mandate for full and open competition."[99] The GAO further stated that the government should consider a late bid if government mishandling was the "paramount cause" of its late receipt, and if consideration of the bid would not compromise the integrity of the procurement process because the bid was in the government's "sole custody" after its receipt at the installation. Based on the specific facts of the case, the GAO concluded that the evidence was sufficient to permit consideration of Telos' bid. The *PS Form 3849 and the IPO's statement* indicated that the installation received an envelope from Telos addressed to the DOC two days before bid opening and, under

---

[90] GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 14.304-1 (1 Apr. 1984) [hereinafter FAR].

[91] FAR 14.304-1(a)(1). A contracting officer may consider a late bid if the bid was sent to a contracting office in the United States or Canada by registered or certified mail not later than five calendar days before the specified bid receipt date.

[92] FAR 14.304-1(a)(3). A contracting officer may consider a late bid if the bid was sent to a contracting office in the United States or Canada by United States Postal Service Express Mail Next Day Service not later than 5:00 p.m. at the place of mailing two working days prior to the date specified for receipt of bids.

[93] FAR 14.304-1(a)(2).

[94] PDP Analytical Services, B-251776.2, Apr. 5, 1993, 93-1 CPD ¶ 294.

[95] FAR 14.304-1(a)(2).

[96] FAR 14.304-1(c).

[97] Chelsea Clock Co., Inc., B-251348.2, May 24, 1993, 93-1 CPD ¶ 401.

[98] Data General Corp., B-252239, June 14, 1993, 93-1 CPD ¶ 457.

[99] *Id.* at 3.

normal operating procedures, the mail should have been delivered to the contracting office the day it was received at the installation. Therefore, the GAO concluded that government mishandling was the "paramount cause" of the late receipt of Telos' bid.

The GAO previously has used a "paramount cause" analysis when deciding whether the government mishandled a late bid, without discussing the FAR requirement that the mishandling be due "solely" to the government. Examples when the GAO has found that the bidder's actions were the paramount cause of the late receipt of the bid include when a bidder improperly addressed its bid,[100] failed to identify the contents of the package as a bid,[101] or failed to allow sufficient time for delivery.[102] In *Data General,* the GAO held that even if Telos had misaddressed its bid, government mishandling was the paramount cause of the late receipt of the bid, because the bid "should have been delivered" prior to bid opening.

This decision demonstrates the GAO's willingness to allow consideration of a late bid—even if a bidder may have contributed to the mishandling; a bidder need not demonstrate that government mishandling was the "sole cause" of the late receipt of its bid. Moreover, this decision brings the "government mishandling exception" of the FAR in line with the "government frustration exception" created by the GAO for late hand-carried bids. Although the FAR is silent on this issue, the GAO has long held that if the government "frustrates" the delivery of a hand-carried bid, or misdelivers a hand-carried bid in the government's possession, then the government may consider the bid if that frustration or misdelivery is the "paramount cause" of the late receipt of the bid.[103]

Additionally, this decision may ease the burden for a bidder attempting to prove that the government received its mailed bid on time at the installation but later mishandled it. The FAR narrowly limits the evidence acceptable to establish the time of receipt of a mailed bid to the "time/date stamp of such installation on the bid wrapper or other *documentary* evidence of receipt maintained by the installation."[104] The GAO previously has construed this provision narrowly,[105] while allowing greater latitude to bidders with hand-carried bids.[106]

In *Data General*, the only documentary evidence available to the GAO was the *PS Form 3849,* which simply indicated that the installation received a piece of certified mail addressed to the DOC on November 30, 1992. The GAO relied on the statement of the IPO to link the *PS Form 3849* to Telos' bid, thus establishing the time of receipt at the installation. The available "documentary evidence"—standing alone—was not sufficient to prove the time of receipt of Telos' bid at the installation.[107] Perhaps the GAO was willing to consider this testimonial evidence only because the bid envelope was lost, presumably by the government.[108] The GAO did not rely, however, on this rationale in considering the IPO's statement. Rather, the GAO held that, when making an assessment regarding the acceptability of a late bid, it will consider "whether a preponderance of all relevant evidence, including statements of cognizant government personnel, supports a conclusion that government mishandling has occurred." This expansive language may permit bidders to prove timely receipt of their late bids at the installation even in the absence of a documentary record.

Legal advisors should ensure that their contracting officers are carefully examining bidder assertions of government mishandling and properly weighing the bidder's contribution to the alleged mishandling. If the government is the "paramount cause" of the late delivery at the installation, the contracting officer should consider the bid, even though the bidder may have contributed to the mishandling. Stated differently, the contracting officer should consider the bid if the government should have delivered the bid on time in spite of some contributing bidder fault. Barring a late bid from the competition for a bidder's minor contribution to the mishandling may not withstand GAO scrutiny. Further, contracting officers should not limit their consideration of evidence to "documentary evidence" when determining whether the government mishandled a late bid. Rather, contracting officers should consider all relevant evidence at the installation, including testimony of cognizant installation officials. Major Causey.

---

[100] PDP Analytical Services, B-251776.2, Apr. 5, 1993, 93-1 CPD ¶ 294.

[101] Environmental Systematics of Minnesota, Inc., B-247518, Apr. 23, 1992, 92-1 CPD ¶ 388.

[102] PDP Analytical Services, B-251776.2, Apr. 5, 1993, 93-1 CPD ¶ 294.

[103] *See, e.g.,* Monthei Mechanical, Inc., B-216624, Dec. 17, 1984, 84-2 CPD ¶ 675; Eagle Int'l, Inc., B-229922, Mar. 1, 1988, 88-1 CPD ¶ 214.

[104] FAR 14.304(c) (emphasis added).

[105] *See* Kings Point Industries, Inc., B-244398, Oct. 11, 1991, 91-2 CPD ¶ 331.

[106] *See* M.J.S., Inc., B-244410, Oct. 17, 1991, 91-2 CPD ¶ 344 (timely receipt of hand-carried proposal may be shown by a "preponderance of all relevant evidence").

[107] *Cf.* Chelsea Clock Co., Inc., B-251348.2, May 24, 1993, 93-1 CPD ¶ 401 (although installation log sheet showed receipt of express mail package prior to bid opening, GAO refused to allow consideration of late bid because no documentary evidence existed to tie the log sheet to the offeror's best and final offer).

[108] *See* Lyttos Int'l Inc., B-246419, Mar. 6, 1993, 92-1 CPD ¶ 265 (because agency discarded bid envelope, the GAO considered "other evidence in the record" to find that bid was timely under the "two-day exception").

The *Eichleay* Formula—Struggling to Survive

Contract performance problems frequently cause delays. These delays can interrupt performance and extend contract performance periods. If the contractor believes that the government is responsible for a delay, it may submit a request for equitable adjustment or a claim under the Contract Disputes Act.[109] When this happens, the parties try to determine how to fairly compensate the contractor for the costs associated with the delay.

One of the best known methods for calculating costs during delays is a three-step approach known as the *Eichleay* formula. This formula takes its name from a 1960 Armed Services Board of Contract Appeals decision[110] in which the board contemplated how to award the appellant a fair proportion of its home office overhead during a period of government-caused delay.[111] The board adopted this approach which allocates overhead to a particular contract by dividing billings for that contract by the contractor's total billings, and by then multiplying the quotient by the contractor's total overhead. The daily overhead rate is then calculated by dividing the overhead allocable to the particular contract by the number of days of performance specified in the contract. The daily overhead rate, multiplied by the number of days of government-caused delay, determines the contractor's overhead recovery.[112]

The *Eichleay* formula assumes that the contractor's home office expenses remain constant during the delay, but cannot be allocated to the contract during that period because the contractor is not incurring sufficient direct costs to absorb the home office expenses. Government attorneys generally have opposed the application of the *Eichleay* formula by advancing one of three arguments to challenge these underlying assumptions.

The first argument is premised on a mitigation of damages theory. Courts and boards have imposed an affirmative duty on contractors to demonstrate that it was impractical for them to take on other work during the period of government-caused delay.[113] To establish this impracticality, the contractor must demonstrate that it exercised reasonable business judgment in keeping its workers and equipment available for work on the delayed contract. The reasonableness of this decision will depend on the nature of the government-caused delay. In *C.B.C. Enterprises, Inc. v. United States*,[114] the United States Court of Appeals for the Federal Circuit (CAFC) stated: "The raison d'etre of Eichleay requires at least some element of uncertainty arising from suspension, disruption or delay of contract performance. Such delays are sudden, sporadic and of uncertain duration. As a result, it is impractical for the contractor to take on other work during these delays." Contracting officers can minimize a contractor's chances for an *Eichleay*-based recovery by giving the contractor advance notice of anticipated delays, and by providing the contractor with a realistic estimate of the expected duration of the delay. If the contractor could use its idled workers and equipment on other work, but fails to do so, the government may argue successfully that the contractor did not mitigate its damages.[115]

A second government argument against an *Eichleay*-based recovery is available when the contractor can, and does, mitigate its delay damages by assigning all of its workers and equipment to other work. In this situation, the contractor will incur direct costs that absorb a proportionate share of home office overhead. Consequently, no unabsorbed overhead exists to be allocated during the delay period, and application of the *Eichleay* formula is unnecessary.[116] Of course, if the "other work" arises under existing commercial contracts or government fixed-price contracts, the contractor will not ordinarily be reimbursed for all of its allocable home office expenses. Consequently, contractors often will attempt to

---

[109] Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1987).

[110] Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688.

[111] The Cost Accounting Standards define "Home Office" as follows:

> An office responsible for directing or managing two or more, but not necessarily all, segments of an organization. It typically establishes policy for, and provides guidance to the segments in their operations. It usually performs management, supervisory, or administrative functions, and may also perform service functions in support of the operations of the various segments.

4 C.F.R. § 403.20(a)(2); *see also* FAR 31.001.

[112] For an excellent discussion of the *Eichleay* formula, *see* BEDNAR ET AL., CONSTRUCTION CONTRACTING 755-64 (1991).

[113] *See* C.B.C. Enters., Inc. v. United States, 978 F.2d 669 (Fed. Cir. 1992); Capital Elec. Co. v. United States, 729 F.2d 743 (Fed. Cir. 1984); Debcon, Inc., ASBCA No. 45050, 93-3 BCA ¶ 25,906; Charles G. Williams Constr., Inc., ASBCA No. 42592, 92-1 BCA ¶ 24,635.

[114] 978 F.2d 669 (Fed. Cir. 1992).

[115] This is especially true if the expected delay period will be long and the alternate job-site is nearby. When the anticipated delay period is short, or the contractor's resources are not readily transferable, it would be reasonable to keep workers and equipment assigned to the delayed contract. *See, e.g.*, Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688; Capital Elec. Co., 729 F.2d at 745-46.

[116] *See* CS&T Gen. Contractors, Inc., ASBCA No. 43657, 93-3 BCA ¶ 26,003; Decker & Co., GmbH, ASBCA No. 38657, 92-2 BCA ¶ 24,970; Interstate Gen. Gov't Contractors, Inc., ASBCA No. 43369, 92-2 BCA ¶ 24,956; Gaffney Corp., ASBCA No. 36497, 92-1 BCA ¶ 23,811.

recover at least a portion of their home office overhead as part of an equitable adjustment under their delayed government contracts. Contractors have not always been successful in these attempts,[117] and contracting officers must be alert to this practice. Knowledge of the contractor's other business activities may be significant in defending an *Eichleay* claim. Thus, recovery of home office overhead has been denied when the government established that the contractor continued to bid on other jobs, received three other contracts, and had not reached its bonding capacity.[118]

Contractors likewise have been unsuccessful in using *Eichleay* to recover overhead costs for contract extensions during which the contractor has performed additional work. For example, assume that a contract requires the contractor to construct a building in 250 days. Thereafter, a change or a differing site condition obligates the contractor to perform additional work and requires an extension of the original contract period. During this extended period, the contractor is incurring additional direct costs that are absorbing the allocable portion of the contractor's overhead. Courts and boards refer to this as "extended overhead" and refuse to apply the *Eichleay* formula, because that formula was only intended to allocate "unabsorbed overhead."[119] Consequently, courts and boards will expect the contractor to establish the amount of its extended overhead with actual cost data.[120]

Finally, the third argument that the government advances to avoid application of *Eichleay* occurs when a contractor attempts to recover unabsorbed overhead, even though the contractor is able to complete the contract within the original performance period. This situation is problematic because the *Eichleay* formula assumes that the government-caused delay extends the period of contract performance.[121] In *Interstate General Government Contractors, Inc. v. Stone*,[122] the CAFC considered this situation and stated:

> In the case where . . . a contractor is able to meet the original contract deadline despite a government caused delay, unabsorbed overhead costs, potentially recoverable pursuant to *Eichleay*, are established only if the contractor can show that it: (1) intended to complete the contract early; (2) had the capability to do so; and (3) actually would have completed early, but for the government's actions.[123]

Although the contractor completed the contract early, the court found this fact legally insufficient to establish the three elements discussed above. The government could defend effectively against this type of claim by demonstrating that the contractor was behind schedule at the time of the government-caused delay, and that timely completion was unlikely.[124]

The *Eichleay* formula frequently is rejected as a means of recovering unabsorbed home office expenses. If the contractor keeps its idled workers and equipment on the job site, the government may argue that it failed to mitigate its damages. Conversely, if the contractor transfers its workers and equipment to other work, the government may argue that the contractor's home office expenses are being absorbed by the direct costs incurred on the other work. After the *C.B.C.* decision,[125] the contractor may only recover if the government-caused delay is "sudden, sporadic, and of uncertain duration," and only if the contractor demonstrates that it could have used its workers and equipment on other contracts, but for the government's actions. Similarly, when a contractor wants to recover unabsorbed overhead because it overcame a government delay and completed the contract within the time allotted, it must satisfy the rigorous three-part test articulated by the CAFC in the *Interstate* decision.[126]

---

[117] *See supra* note 113 cases cited.

[118] Charles G. Williams Constr., Inc., ASBCA No. 42592, 92-1 BCA ¶ 24,635.

[119] *See* Community Heating and Plumbing Co. v. Kelso, Intermax, Ltd., 987 F.2d 1575 (Fed. Cir. 1993); CS&T Gen. Contractors, Inc., ASBCA No. 43657, 93-3 BCA ¶ 26,003; Lake Falls Constr., Inc., ASBCA No. 42995, 93-2 BCA ¶ 25,698.

[120] *See* Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 (1993); Cen-Vi-Ro of Texas, Inc. v. United States, 210 Ct. Cl. 684, 538 F.2d 348 (1976); Assurance Co., ASBCA No. 30116, 86-1 BCA ¶ 18,737; Beaty Elec. Co., EBCA No. 408-3-88, 91-2 BCA ¶ 23,687.

[121] For example, if the contract specifies a 100-day performance period and overhead allocable to this contract is $1000, the daily overhead rate is $10 per day. Assume that the contractor planned to finish early—that is, in 80 days—but that the government was responsible for a compensable delay of 30 days. During the first 80 days of performance, the contractor will recover almost all of the $1000 of overhead. This is so because the project will consume approximately the same amount of direct labor and direct material costs, only in a shorter time. These direct costs will absorb essentially all the contractor's allocable overhead. If the government pays the contractor $10 for each day of government delay, the contractor receives $300 in addition to the overhead allocated to the 80-day performance period. As indicated in the discussion above, courts and boards are reluctant to use *Eichleay* when the original contract period is not extended.

[122] 12 FPD ¶ 56 (Fed. Cir. 1993).

[123] *Id.* at 4; *see also* CS&T Gen. Contractors, Inc., ASBCA No. 43657, 93-3 BCA ¶ 26,003.

[124] This data will be available to the contracting officer if the Critical Path Method of scheduling is used, or if the contract includes FAR clause 52.236-15, Schedules for Construction Contracts.

[125] *See supra* note 114 and accompanying text.

[126] *See supra* note 122 and accompanying text.

While *Eichleay* may not be dead, it is certainly ailing. Courts and boards have used several means to avoid applying *Eichleay*. Contracting officers and their attorneys who are aware of *Eichleay's* limited applicability will avoid reimbursing contractors unnecessarily. Major Tomanelli.

International Law Notes

"Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement

On October 11, 1993, eighteen senior line officers and judge advocates converged on The Judge Advocate General's School (TJAGSA) with the mission to overhaul the Joint Chiefs of Staff (JCS) Peacetime Rules of Engagement (PROE). For the next four days they dissected, analyzed, rewrote, and assembled a working document that may serve as the cornerstone to the use of America's force in the post-Cold War era.

Tasking

The group was tasked by Lieutenant General Tilleli, Army Deputy Chief of Staff for Operations, to recommend changes to the PROE to the Joint Staff. Specifically, the group was to look at the land forces portion of the document, and to make the necessary changes to bring it in line with today's realities. Colonel Ruppert, Chief of International and Operational Law, Office of The Judge Advocate General, spearheaded the effort and the Center for Law and Military Operations (CLAMO) at TJAGSA organized the symposium.

History

In response to the expanding Soviet fleet in the 1970s, the United States Navy developed standardized ROE for maritime forces worldwide. In 1981, the Chief of Naval Operations promulgated the Maritime ROE. Admiral Crowe found the concept so useful, that in 1986 he convinced the Joint Staff to adopt what was basically the Maritime ROE as the JCS Peacetime ROE.

Two significant events occurred that served to "bracket" the proper use of force for the Navy. On 17 May 1987, the U.S.S. *Stark*, on patrol in the Persian Gulf, was hit by two Exocet missiles fired from an Iraqi Mirage jet. The Mirage pilot apparently fired on the *Stark* in error, thinking it was a commercial vessel bound for a port of Iraq's enemy, Iran. Nevertheless, the incident highlighted the tragic consequences of failing to adequately comprehend the ROE. Thirty-seven sailors were killed in the incident. While the Navy's role was supposed to be rather benign—to protect shipping in the Gulf via the tanker "reflagging" operation—the environment actually had become quite hostile. After the *Stark*, the ROE were changed to stress anticipatory self-defense in respect to hostile intent.

One year later, on 3 July 1988, the U.S.S. *Vincennes* also was on duty in the Persian Gulf. It became engaged in a fire-fight with well armed and extremely maneuverable Iranian patrol boats that had fired on a United States Navy aircraft earlier that day. When the crew of the *Vincennes* picked up an unidentified aircraft coming from Iran directly toward the ship, the Captain ordered the aircraft to be engaged. An Iranian airbus was knocked from the sky, killing 290 civilians.

On 26 October 1988, the JCS revised its PROE, incorporating the recent lessons from the *Stark* and the *Vincennes*. The new PROE balanced the improper inaction of the *Stark* on the one hand with the anticipatory strike of the *Vincennes* on the other. The 1988 version is what all United States forces have been operating under for the last five years, with a few brief exceptions during Operations Just Cause and Desert Storm. And even then, only certain units switched to wartime ROE; most support units remained under the PROE throughout the hostilities.

Current Situation

The week before the ROE Symposium, staff judge advocates and other senior judge advocates met for their yearly Worldwide Continuing Legal Education at TJAGSA. During the ROE update seminars, the attendees were asked who had worked with the JCS PROE before. A liberal estimate of those senior judge advocates who responded affirmatively, was one-third. Thus, if you are not familiar with the document, you are in the majority of Army judge advocates. The reason can be traced to the PROE's history: the document was written by sailors, for sailors.

While many people tend to think of soldiers on the ground when they hear "ROE," examination of real world settings prior to 1988 showed that when the Army deployed overseas, ROE for routine daily matters usually were not a major concern. That is, when the Army deployed it almost always was pursuant to a treaty or an invitation—such as, NATO and bilateral training exercises. The guidelines (ROE) for dealing with people usually were established by the agreement, and seldom did soldiers confront situations when they had to make hostile act or intent determinations. On the other end of the spectrum, when the Army did deploy for combat, ROE became simple: hostile forces could be engaged, and United States forces always maintained the right to self-defense. Accordingly, the Army never built and used the "supplemental" structure found in the JCS PROE the way the Navy did.

But the world has changed dramatically since 1988, and the Army is being called on to handle a number of missions "other than combat." Increasingly the Army is being put into nebulous situations resulting from peacekeeping and peace-enforcement missions, as well as humanitarian interventions. These missions call for soldiers to enter more frequently the gray areas where "who is friend and who is foe" is not readily apparent. Soldiers are now routinely put in similar situations to what the Navy has confronted historically—being deployed in various locations and needing rules to guide their engagements with potentially hostile forces. Until the October Symposium, the land forces had not made any effort to make the

document more "green" in nature. Now, that effort has occurred, and the results are dramatic.

The Standing ROE

Beginning with the name, the ROE proposed by the Symposium took on a new flavor. Recognizing the changed world since 1988, the group quickly disposed of the Cold War reference to "Peacetime" in the title, and went to a more generic, all-inclusive description for the title: "Standing ROE." The group then proceeded to tackle three main areas: (1) overall organization; (2) Section I, Standing ROE; and (3) Section II, Supplemental ROE.

While the Symposium charter was to recommend changes to the land forces portion of the PROE, the group felt that the land forces could not be completed in a vacuum. The group decided that to be most meaningful, the land forces section should supplement the joint area, and the naval and air sections should do the same. Consequently, the entire document would have to be redone, pulling the Service-specific material out of the joint portions, and clearly identifying the specific material with that Service with which it most directly related. This approach should make it easier for line officers or Service judge advocates to retrieve information.

This approach also allows for the different mind-sets of each Service to be reflected in its ROE, with the joint area addressing any conflict between the Services. Two examples illustrate this point. The Navy and Air Force "man their equipment;" the Army "equips its men." Accordingly, the Navy tends to think first of *unit* self-defense, because they deploy on ships, as units. The Army, centered on the individual soldier, thinks first of individual self-defense, and then unit and national self-defense. A second example shows the difference between Naval Air and Air Force concerns. Due to situations like the *Stark*, the Navy wants to be able to engage unidentified planes demonstrating hostile intent toward the fleet. Naturally, the Air Force takes a dim view at shooting unidentified planes, and seeks a rule that allows the shooting of only those planes clearly identified as hostile.

The group gave the PROE a complete overhaul, while maintaining the structure that has proven valid over time. Section I kept its general nature and still applies to all United States forces 365 days a year. Similarly, Section II remains the contingency ROE; specific ROE are drawn from this section depending on the nature of a particular operation. The overhaul occurred in the "fleshing-out" of the two sections into more Service-specific annexes and tabs.

The group consciously raised, and then disposed of, the notion to write scenario-specific ROE. Instead, the group decided to keep the JCS Standing ROE at the general level, and to leave the mission specific ("down in the weeds") ROE to corps, divisions, and lower level units.

Section I

In this section, the group eliminated much of the Cold War and terrorist oriented language to fits today's situation. Section I now contains a truly joint set of ROE, along with separate annexes for maritime, air, and land forces. This section gives guidance to all forces on self-defense. To be clear as to when, where, and to whom these Standing ROE apply, the last annex in section I lists those units, and those situations that specifically are excepted from following these rules.

Section II

Section II, addressing contingency and supplemental measures, took on a whole new direction for land forces. In concept, supplementals were developed along a continuum of the use of force. The further down the list one travels, the closer one gets to "wartime ROE." Then, within each supplemental, three choices are listed. Such force is: (a) prohibited; (b) permitted under listed specific circumstances; or (c) permitted. The supplementals may be given along with the operation plan, can be requested by any commander, or an appropriate supplemental may be drafted to fit the particular circumstances of the mission. Sample request messages for supplementals are given in the "Standing ROE."

The Future

The Symposium work product is now being staffed within the Army. The final draft will become the Army's input to the JCS ROE Symposium to be held in January, 1994. A senior representative from the Navy participated in this endeavor, and strongly supported these revision efforts.

While the CLAMO Symposium was a huge success—having made substantial progress towards implementing meaningful land forces ROE—it was only a beginning. Much of the difficult, "down in the weeds" work was intentionally not tackled for a variety of reasons. This effort would have required substantially more time, the product would have been too issue specific to have been accepted at the JCS level, and the proper people were not assembled to accomplish what was needed. Instead, the group purposely avoided this area, and carried back to their work places the personal mission of getting the right people to develop the scenario-driven ROE.

This leaves those of us working with ROE several problems yet to solve. First, when scenario-driven ROE are written, where and how should they be collected? How best can they be disseminated? While the *OPLAW Handbook* is convenient for lawyers, line officers seldom know of its existence. Another issue is that of format. Currently, the ROE appear in everything from bullet format on pocket cards, to thirty-page dissertations in operation plans. Do ROE lend themselves to standardization like a five paragraph operation order (which is what *Joint Publication 5-03.2*[127] directs)? If so, what ROE

[127] JOINT PUB. 5-03.2, JOINT OPERATION PLANNING AND EXECUTION SYSTEM, VOL. II (SUPPLEMENTAL PLANNING FORMATS AND GUIDANCE), III-205 (10 Mar. 1992).

concepts should go in paragraph 3 (execution) as opposed to paragraph 5 (command and control)? We should strive to standardize scenario-specific ROE using the joint operation planning and execution system format, and deviate from the standard only when the mission requires it. This way, training can be standardized, regardless of what unit one happens to be in.

If you have ideas in this area, let the appropriate people know. Begin with your operational law attorney and SJA, and then contact either DAJA-IO or ADI at TJAGSA. The XVIII Airborne Corps at Fort Bragg, North Carolina, is already planning ROE conferences with its divisions and appropriate line officers. At the request of the Army and Navy, JCS extended its five-year suspense to review the PROE from October 1993 to February 1994. If the JCS adopts the proposals of the CLAMO Symposium, by the Spring of 1994 we can look forward to ROE that are more coherent and meaningful to land forces. Major Warner.

Claims Report

United States Army Claims Service

Personnel Claims Note

Statute of Limitations on Claims with Multiple Deliveries

"37 U.S.C. § 3721(g) provides that a claim must be presented in writing to a military installation within two years after the damage or loss accrues. This requirement is statutory and may not be waived, even when the claimant relies on bad advice given by claims personnel."[1] The "bad advice by claims personnel" is the subject of this note.

The United States Army Claims Service frequently receives claims for reconsideration that involve "split," or multiple deliveries made on the same government bill of lading. In these cases, the claim accrues for items damaged or lost in subsequent deliveries on the date *those* items are delivered—not on the date that the first shipment was delivered. This is an interim change and will be included in the next revision of *Army Regulation 27-20*.[2]

The "bad advice" issue arises when claims personnel inform claimants that they cannot file a claim until the entire shipment has been delivered. Claimants must be told to file timely claims for items they know to be lost or damaged and to amend their claims if they sustain additional damage or loss in subsequent deliveries.

Whenever possible, refrain from giving oral advice about the various time limitations—such as the time for filing the *Department of Defense Form 1840R*,[3] or the time for filing a claim. A better practice is to prepare a written handout addressing the various time limits. Establishing such a practice eliminates confusion, provides claimants with accurate information to file their claims in a timely manner, and protects the claims office from the claimant who runs afoul of the statute of limitations, then alleges that some unknown person in the claims office provided misinformation.

A suggested handout paragraph follows:

"You have two years from the date of delivery to file a claim against the government for property damaged, lost, or destroyed in shipment or storage. If you receive more than one delivery on the same government bill of lading, you have two years from each delivery date to file a claim for that portion of your personal property. Example: You had 12,000 pounds of personal property packed at origin. When you arrived at destination, your quarters were not large enough for all your property. You accepted a portion of your property on 10 July 1991, and the remainder was placed in storage at government expense. You must file your claim for all damage and loss to the portion you accepted by 10 July 1993. Larger quarters become available and the remainder of your goods are delivered on 4 February 1992. You must amend your claim to include all damage and loss incurred during storage and subsequent delivery by 4 February 1994." Ms. Zink.

---

[1] *See* DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 2-13a (15 Dec. 1989).

[2] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990).

[3] Dep't of Defense, DD Form 1840R, Notice of Loss or Damage (Jan. 1988).

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The following advisory Professional Responsibility Committee (PRC) opinion, which applies the *Army Rules of Professional Conduct for Lawyers* (*Army Rules*),[1] is intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for Army lawyers. Mr. Eveland.

Professional Responsibility Committee Opinion 93-2 Advisory Opinion

The Judge Advocate General requested that the PRC render an advisory opinion on a matter of interest to staff judge advocates. The need for an advisory opinion arose because of a difference of views expressed during an ethical inquiry. The facts of that situation will be used as a general scenario to frame the issue.

Facts

A commanding general (CG) decided to take disciplinary action against a senior member (the soldier) of his command for an incident of sexual misconduct. The CG initially had the incident investigated by another member of the command under the provisions of *Army Regulation 15-6*.[2] Based upon this initial investigation, the CG decided to issue the soldier a letter of reprimand to be filed in the soldier's official military personnel file. However, the CG was not completely satisfied that he knew all the facts. He, therefore, called some of the witnesses to his office to discuss the facts with him. The staff judge advocate of the command (SJA) was present during these sessions but did not ask any questions and only took detailed notes. Subsequently, the CG had the soldier report to his office. The SJA was notified of the meeting of the CG and the soldier by the CG's staff. The SJA was told that the CG wanted him also to be present.

The soldier previously had consulted with an attorney and was represented in the matter by an attorney from the Trial Defense Service. Although the SJA knew the soldier was represented by counsel in the matter, counsel was not informed by either the SJA or the CG's staff that the CG was meeting with the soldier to discuss the issue of the disciplinary action to be taken.

The only person present at the meeting, other than the CG and the soldier, was the SJA. The CG informed the soldier of his rights under Article 31, Uniform Code of Military Justice (UCMJ). The CG, also realizing that the soldier was represented by an attorney, inquired whether the soldier wanted the attorney present. The soldier declined the presence of his attorney and agreed to discuss the matter with the CG. The SJA did not participate in any of the discussions with the soldier but was merely present in the room. Upon completion of the interview, the CG gave the soldier a letter of reprimand to be filed in the soldier's Official Military Personnel File.

Issue

Was the failure of the Staff Judge Advocate to notify the counsel for the soldier that the soldier was to meet with the CG and that the SJA would be present at that meeting a violation of the *Army Rules*?

Discussion

A commander has an inherent right and authority to discuss matters of command interest with soldiers of the command. The only limitation on the commander is the soldier's right against self-incrimination and the requirements of Article 31, UCMJ.[3] The scenario involves an informal procedure used

---

[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

[2] DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988).

[3] Editors Note: Practitioners should recognize a related issue arising under Military Rule of Evidence (MRE) 305(e). Under this rule, any person who is bound to give Article 31 warnings prior to questioning an accused or suspect also must inform the accused's or suspect's counsel of the intended questioning. The rule applies when the questioner knows, or reasonably should know, that the person to be questioned has counsel with respect to the offense he or she will be questioned about. Counsel must be given a reasonable opportunity to attend the questioning before an interrogation may proceed. Military Rule of Evidence 305(e) is drawn from *United States v. McComber*, 1 M.J. 380 (C.M.A. 1976).

A person may waive the right to counsel described in MRE 305(e). However, the consent of counsel requirement established in *Army Rule* 4.2 cannot be waived by the represented party. When MRE 305(e) applies, waiver is not valid unless the government demonstrates that reasonable efforts to notify defense counsel were unavailing or that the counsel, once notified, did not attend the interrogation. See MRE 305(g)(2).

The Military Rules of Evidence generally apply only in the context of a court-martial. See MRE 101 and 1101. The facts of the advisory opinion indicate that the CG's and SJA's actions occurred outside the court-martial arena. Military Rule of Evidence 305 was thus inapplicable.

Military Rule of Evidence 305(e) does, however, provide guidance for addressing the situation the SJA confronted. Practitioners can avoid the ethical problems identified by the Committee by notifying a soldier's counsel before an interview by a commander at which a government attorney will be present.

by a commander inquiring into matters of concern within his command. The procedures used by the CG are not governed by a regulatory or statutory procedure. *Army Regulation 600-37*[4] does not require specific procedures to be used before issuing a letter of reprimand. While both the CG and the SJA believed these sessions to be administrative, they were in part investigative since the CG, as the fact finder, was assessing the witnesses' credibility. Our opinion will be based on the use of informal procedures, but the extent to which our views may apply to formal procedures will be noted.

The commander has an inherent right to discuss issues with his soldiers. The rules change, however, when the commander involves a lawyer in the procedures and the soldier is represented by counsel. In addition to procedural rules binding on both the commander and the SJA, the SJA must also abide by the *Army Rules.*[5]

Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[6]

The Comment accompanying the rule states that the parties to the matter may communicate directly with each other. This recognizes the inherent right of parties to a matter to deal with each other without the presence of lawyers. This reinforces the view that the commander can discuss matters of interest with a soldier without notifying the attorney representing the soldier.

Two aspects of this rule must be considered. The first is whether the SJA was "representing a client." When a commanding general asks that the SJA attend a meeting with a soldier, the SJA is not present merely to be a witness. The SJA is present to advise the commander and assure the legality and accuracy of the commander's action.

The second question is whether the SJA "communicated" with the soldier at the meeting when the SJA was merely present and did not speak with the soldier or otherwise participate in the discussion. The SJA does not need to speak to communicate. Albeit passively, his presence signifies to the soldier that the actions against him are serious, proper, and in accordance with law and regulation.

One view of Rule 4.2 is that once an attorney learns that his or her client has initiated communications with a represented party, the attorney is prohibited from advising or assisting the client with regard to the subject of the communication or assisting the client in any manner that would constitute using the client as a vehicle for communicating with the represented adverse party, absent approval from opposing counsel. Under this view, once the SJA learned that the CG was to meet with the soldier without counsel present, the SJA was required either to advise the soldier's counsel of the meeting and have counsel afforded the opportunity to be present, or to advise the CG that he (the SJA) could not ethically participate in the meeting.

An SJA must recognize the risk of informal procedures in handling disciplinary matters. Staff judge advocates should not have a mind-set that the soldier is receiving more due process than required, therefore why should the soldier complain or be concerned when he already knew the most he would receive was a letter of reprimand filed in the Official Military Personnel File. Such a mind-set is misguided. Rule 4.2 basically requires the attorney to "look out for the other guy." It recognizes that a lawyer representing a party needs to know when his client is about to talk to an adverse party, especially when that party has his lawyer present. The lawyer does not want his client to get caught up in the moment and damage his cause. The potential for abuse is heightened where the procedures are ill-defined as in this case. Not all lawyers will take such a passive role as the SJA in this case.

Prudence would also lead SJAs always to advise counsel representing a soldier of a potential meeting. The SJA's function is to ensure the legality of the proceedings. Opposing counsel's presence does not hinder a commander from resolving the issue but does assure that the proceedings are legal and that the soldier and the members of the command *perceive* that the commander has acted properly. The tenor of the proceedings can only be enhanced by taking the time to notify opposing counsel that their client is to discuss a matter with the commander and the SJA is to be present. It would behoove SJAs to ensure this notice is given in both formal and informal proceedings.

Opinion

Accordingly, it is our opinion that the essential conditions for applicability of Rule 4.2 are met. The SJA is representing a client and is communicating with a party represented by counsel without the approval of that counsel. Therefore, an SJA who is to be present at a meeting involving informal procedures not specifically prescribed by statute or regulation, between the commander and a soldier whom the SJA knows is represented by legal counsel in the matter to be discussed, must notify the soldier's counsel of the meeting and not attend the meeting unless the soldier's counsel consents.

---

[4] DEP'T OF ARMY, REG. 600-37, PERSONNEL-GENERAL: UNFAVORABLE INFORMATION (19 Dec. 1986).

[5] AR 27-26, *supra* note 1.

[6] *Id.*

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

FY 94 JAGC Selection Board Schedule

The following is a listing of remaining fiscal year (FY) 94 selection boards involving judge advocates:

Date	Competitive Category
18-21 Jan 94	Major Promotion Selection Board
25 Feb 94	Captain Promotion Selection Board
19-20 Apr 94	CVI Career Status Selection Board
10-27 May 94	JAGC SSC Selection Board
23-26 Aug 94	Colonel Promotion Selection Board
	Captain Promotion Selection Board
20-23 Sept 94	Lieutenant Colonel Promotion Selection Board

The eligibility criteria and zones of consideration will be announced by message approximately sixty to ninety days before the convene date of each board.

FY 94 Major Promotion Selection Board

On 18 January 1994, a promotion selection board will convene to consider eligible judge advocate captains for promotion to major. The announced zones of consideration are:

Above the Zone:	31 July 1987 and earlier
In the Zone:	1 August 1987 through 31 July 1988
Below the Zone:	1 August 1988 through 28 February 1989

The key items that the board considers include: the performance fiche of the Official Military Personnel File (OMPF); the Officer Record Brief (ORB); and the official Department of the Army (DA) photograph. These items should be up-to-date and complete; otherwise, the wrong message may be sent to board members. Please note that photographs[1] and physicals[2] older than five years are considered out-of-date.

Officers who have not reviewed their OMPF performance fiche recently should request a copy from PERSCOM. A written request containing the officer's full name, rank, social security number, and mailing address should be sent to:

Commander
U.S. Total Army Personnel Command
ATTN: TAPC-MSR-S (Selection Board Processing Unit)
200 Stovall Street
Alexandria, Virginia 22332-0444

Alternatively, requests can be faxed directly to PERSCOM at commercial: (703) 325-0742; DSN: 225-0742.

Officers also should contact their supporting Personnel Service Company (PSC) to review their board ORB. PERSCOM mailed board ORBs to PSCs on 21 October 1993. The PSC will forward the signed board ORB through personnel channels to PERSCOM for inclusion in the officer's promotion board file.

Updated DA photographs (a color photograph is preferred, but not required), a back-up copy of the signed board ORB, and any documentation missing from the OMPF performance fiche should be mailed directly to:

HQDA (DAJA-PT)
ATTN: MAJ Cullen
Pentagon Room 2E443
Washington, D.C. 20310-2200

For the promotion board to consider an OER or AER, it must be received by Officer Records Branch at PERSCOM not later than 4 January 1994. If a report is late, a waiver can be obtained in accordance with *Army Regulation 624-100*.[3] Complete-the-record OERs must comply with *AR 623-105*[4] and have a "Thru Date" of 5 November 1993. They also are due at PERSCOM not later than 4 January 1994.

Questions on promotion files or board procedures should be addressed to MAJ Cullen (DAJA-PT), DSN: 225-8365.

Defense Strategy Course

Each year the Judge Advocate General's Corps is allocated two slots for the Defense Strategy Course. This is a six-month correspondence course offered by the Army War College which examines issues that influence United States national security strategy. Successful completion of the

---

[1] DEP'T OF ARMY, REG. 640-30, PERSONNEL RECORDS AND IDENTIFICATION OF INDIVIDUALS: PHOTOGRAPHS FOR MILITARY PERSONNEL FILES (1 Oct. 1991).

[2] DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (15 May 1989).

[3] DEPT OF ARMY, REG. 624-100, PROMOTIONS: PROMOTION OF OFFICERS ON ACTIVE DUTY, para. 2-7 (21 Aug. 1989).

[4] DEP'T OF ARMY, REG. 623-105, PERSONNEL EVALUATION REPORTS: OFFICER EVALUATION REPORTING SYSTEM, para. 5-21 (31 Mar. 1992).

course requires submission of three 1500-word written assignments and approximately six hours of reading per week for the duration of the course. No formal Military Education Level (MEL) is awarded for completion of the course, but it will be reflected on the ORB as a school attended/completed.

Enrollees must have completed CGSC and not be enrolled in a MEL-1 program. The next class will run from 18 May 1994 through 22 November 1994. Interested judge advocates should contact LTC Romig, DSN: 225-1353, for additional information.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

The following is an updated schedule of The Judge Advocate General's continuing legal education On-Sites. If you have any questions concerning the On-Site schedule direct them to the local action officer or CPT David L. Parker, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
8-9 Jan 94	Long Beach, CA 78th LSO Long Beach Marriott Inn Long Beach, CA 90815	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	 COL Sagsveen LTC McFetridge MAJ Burrell Dr. Foley	MAJ John C. Tobin 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 752-1455
21-23 Jan 94	San Antonio, TX 90th ARCOM San Antonio Airport Hilton San Antonio, TX 78216	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG Gray COL Cullen MAJ Emswiler LTC Dorsey CPT Schempf	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209 (210) 221-5164
29-30 Jan 94	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Criminal Law Int'l Law GRA Rep	MG Nardotti COL Cullen MAJ O'Hare LCDR Winthrop LTC Hamilton	MAJ Mark W. Reardon 6th LSO Bldg. 572 Fort Lawton, WA 98199 (206) 281-3002
26-27 Feb 94	Salt Lake City, UT UT ARNG HQ, Utah National Guard 12953 Minuteman Drive Draper, UT 84020-1776	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Sagsveen MAJ Wilkins LTC Killham CPT Parker	MAJ Patrick Casaday HQ, UT ARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
26-27 Feb 94	Denver, CO 87th LSO Edgar L. McWethy, Jr. USARC Bldg. 820 Fitzsimons Army Medical Ctr Aurora, CO 80045-7050	AC GO RC GO Criminal Law Contract Law GRA Rep	BG Magers COL Cullen MAJ Wilkins MAJ Killham Dr. Foley	LTC Dennis J. Wing Bldg. 820 McWethy USARC Fitzsimons AMC Aurora, CO 80045-7050 (303) 343-6774
5-6 Mar 94	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	MG Nardotti COL Sagsveen MAJ Hudson MAJ Jennings LTC Menk	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
12-13 Mar 94	Washington, D.C. 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Winn MAJ Diner CPT Parker	CPT Robert J. Moore 10011 Indian Queen Pt Rd. Fort Washington, MD 20744 (202) 835-7610
19-20 Mar 94	San Francisco, CA 5th LSO Sixth Army Conference Room Bldg. 35 Presidio of SF, CA 94129	AC GO RC GO Criminal Law Int'l Law GRA Rep	MG Gray Cullen/Lassart/Sagsveen MAJ Jacobson MAJ Warren COL Schempf	MAJ Robert Jesinger 20683 Greenleaf Drive Cupertino, CA 94014-8808 (408) 297-9172
25-27 Mar 94	New Orleans, LA 122nd ARCOM Sheraton on the Lake Hotel Metairie, LA 70033	AC GO RC GO Int'l Law Criminal Law GRA Rep	MG Nardotti COL Lassart MAJ Johnson MAJ Hunter Dr. Foley	LTC George Simno Leroy Johnson Drive New Orleans, LA 70146 (504) 282-6439
Apr 94	Indianapolis, IN INARNG TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Sagsveen MAJ DeMoss MAJ Warren LTC Menk	MAJ George C. Thompson HQ, State Area Command P.O. Box 41326 Indianapolis, IN 46241-0326 (317) 247-3449
23-24 Apr 94	Atlanta, GA 81st ARCOM TBD	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden LTC Crane COL Schempf	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep	BG Huffman COL Sagsveen MAJ Peterson MAJ Warner LTC Menk	LTC Samuel A. Rumore 5025 Tenth Court, South Birmingham, AL 35222 (205) 323-8957
14-15 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen MAJ Causey LTC Crane CPT Parker	LTC Thomas G. Shumacher 762 Woodview Drive Edgewood, KY 41017-9637 (513) 684-3583

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1994

3-7 January: 44th Federal Labor Relations Course (5F-F22).

10-13 January: USAREUR Tax CLE (5F-F28E).

10-14 January: 1994 Government Contract Law Symposium (5F-F11).

18 January-25 March: 133d Basic Course (5-27-C20).

24-28 January: PACOM Tax CLE (5F-F28P).

7-11 February: 122d Senior Officers' Legal Orientation Course (5F-F1).

22 February-4 March: 132d Contract Attorneys' Course (5F-F10).

7-11 March: USAREUR Fiscal Law CLE (5F-F12E).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

28 March-8 April: 1st Criminal Law Advocacy Course (5F-F34)

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

11-15 July: 6th STARC Judge Advocate Mobilization and Training Workshop.

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

March 1994

1-4, ESI: ADP/Telecommunications (FIP) Contracting, Washington, D.C.

7-11, GWU: Construction Contracting, Washington, D.C.

8-11, ESI: Small Purchases, Washington, D.C.

14-15, ESI: Government Contract Claims, Washington, D.C.

14-18, ESI: Operating Practices in Contract Administration, Washington, D.C.

15, ESI: Sole-Source Contracting, Denver, CO.

16, GWU: Federal Procurement of Architect and Engineer Services, Washington, D.C.

21-25, ESI: Managing Projects in Organizations, Washington, D.C.

21-25, GWU: Cost-Reimbursement Contracting, Washington, D.C.

28, ESI: Federal Acquisition Regulation (FAR) Update, Washington, D.C.

29, GWU: Government Contract Compliance: Practical Strategies for Success, Washington, D.C.

29 March-1 April, ESI: Competitive Proposals Contracting: Negotiated Procurement Using Best-Value Techniques, Washington, D.C.

29 March-1 April, ESI: Specifications for ADP/T (FIP) Hardware and Software, Washington, D.C.

30 March-1 April, GWU: ADP/Telecommunications Contract Law, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1993 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually

Jurisdiction	Reporting Month
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1993 issue of *The Army Lawyer.*

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.* The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755	Government Contract Law Deskbook Vol 1/JA-501-1-93 (499 pgs).
AD A265756	Government Contract Law Deskbook, Vol 2/JA-501-2-93 (481 pgs).
*AD A265777	Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD A263082	Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).
AD A259516	Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).
AD B164534	Notarial Guide/JA-268(92) (136 pgs).
AD A228272	Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

*AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).

AD A259022 Tax Information Series/JA 269(93) (117 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

*AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

*AD A269036 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

> The units below are authorized publications accounts with the USAPDC.
>
> (*1*) *Active Army.*
>
> (*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)
>
> (*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.
>
> (*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.
>
> Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of *DA Pam. 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD

agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

1) Active duty Army judge advocates;

2) Civilian attorneys employed by the Department of the Army;

3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;

4) Active duty Army legal administrators, noncommissioned officers, and court reporters;

5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;

6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS); and

7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
Attn: LAAWS BBS SYSOPS
Mail Stop 385, Bldg. 257
Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or explode, the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt.

The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When ask to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When ask to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
1990_YIR.ZIP	January 1991	This is the 1990 Year in Review article in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
261.ZIP	April 1993	Legal Assistance Real Property Guide March 1993.
505-1.ZIP	March 1993	Contract Attorneys' Deskbook, Volume 1, 129th Contract Attorneys' Course, March 1993.
505-1.ZIP	March 1993	Volume 1 of the May 1992 Contract Attorneys' Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys' Course Deskbook.
506.ZIP	November 1991	The November 1991 Fiscal Law Deskbook from the Contract Law Division at TJAGSA.
93CLASS.ASC	July 1992	FY93 TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY93 TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY93 TJAGSA Course Schedule, ASCII.
93CRS.EN	July 1992	FY93 TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.

FILE NAME	UPLOADED	DESCRIPTION
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.TXT	June 1993	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard—only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1993	Defensive Federal Litigation—Part A, June 1993.
JA200B.ZIP	August 1993	Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	October 1992	Law of Federal Employment, October 1992.
JA211.ZIP	August 1992	Law of Federal Labor—Management Relations, July 1992.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235-92.ZIP	August 1992	Government Information Practices, July 1992 ed. Updates JA235.zip.
JA235.ZIP	August 1993	Government Information Practices.
JA241.ZIP	March 1992	Federal Tort Claims Act.
JA260.ZIP	September 1983	Soldiers' & Sailors' Civil Relief Act. Updated September 1993.
JA261.ZIP	March 1992	Legal Assistance Real Property Guide.
JA262.ZIP	March 1992	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	January 1993	Legal Assistance Notarial Guide.
JA269.ZIP	January 1993	Federal Tax Information Series, December 1992.
JA269.ZIP	January 1993	Federal Tax Information Series.
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	March 1992	Senior Officer's Legal Orientation.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	July 1992	Unauthorized Absence—Programmed Text, July 1992.
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992.
JA320.ZIP	July 1992	Senior Officers Legal Orientation Criminal Law Text, May 1992.
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, March 1992.
JA337.ZIP	July 1992	Crimes & Defenses Deskbook, July 1992.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.

FILE NAME	UPLOADED	DESCRIPTION
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993	Volume 1, TJAGSA Contract Law Deskbook, May 1993.
JA501-2.ZIP	June 1993	Volume 2, TJAGSA Contract Law Deskbook, May 1993.
JA506.ZIP	June 1993	TJAGSA Fiscal Law Deskbook, May 1993.
JA509.ZIP	October 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, and Remedies Course held in September 1992.
JAGSCHL.WPF	March 1992	JAG School report to DSAT. ND-BBS.ZIPJuly 1992TJAGSA Criminal Law New Developments Course Deskbook August 1992.
V1YIR91.ZIP	January 1992	Volume 1 of TJAGSA's Annual Year in Review for CY 1991 as presented at the January 1992 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's annual review of contract and fiscal law for CY 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's annual review of contract and fiscal law for CY 1991.YIR89.ZIPJanuary 1990Contract Year in Review, 1989.
NA241.ZIP	September 1993	Federal Tort Claims Act, updated August 1993.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, Sergeant First Class Tim Nugent, commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph a, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Pat M. Falcigno, North Atlantic Division, COE, 90 Church Street, New York, New York 10007-2979, has one set each of the following:

- Shepard's Citations
- Corpus Juris Secondum
- West's McKinney Consolidated Laws of New York
- West's McKinney New York Forms
- Federal Merit System Reporter
- West's Federal Practice Digest
- Government Contracts Citator

Ms. Joanne F. Manaseri, Seneca Army Depot, Romulus, New York 14541-5001, commercial: (607) 869-1447/1478, DSN: 489-5447/5478, has one set each of the following:

- New York Supplements, 2d series
- New York McKinney's Forms

CW3 Thomas Chilton, HQ, VIII Airborne Corps & Fort Bragg, Fort Bragg, North Carolina 28307-5000, commercial: (910) 396-7268, DSN: 236-5506/5306, has one volume each of the following:

- Federal Supplement, vols. 689, 706, 727, 728
- U.S. Supreme Court Reports, L.Ed. 3d, volume 111

CW2 Tommy Worthey, USA Armor Center, Fort Knox, Kentucky 40121, commercial: (502) 624-4628/2669, DSN 464-2669/4628, has one set each of the following:

- Northeastern Reporter, vols. 1-609
- Southwestern Reporter 2d, vols. 1-848
- Words and Phrases, 90 books
- United States Code Annotated, 210 books

Subject Index

The Army Lawyer
January 1993—December 1993

-A-

-C-

Author Index

The Army Lawyer

January 1993—December 1993

Index of Legal Assistance Items

The Army Lawyer
January 1993-December 1993

Index
Policy Memoranda From The Judge Advocate General

The Army Lawyer
January 1993—December 1993

Ethics Counselors and the Army Standards of Conduct, DAJA-SC, 19 January 1993, Feb. 1993, at 3.

Copyright Ownership Determination Procedures, JALS-IP, 14 December 1992, Feb. 1993, at 4.

After Action Reporting Policy, DAJA-IO, 13 April 1993, June 1993, at 3.

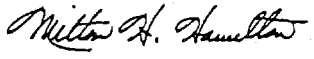
Supervision of Nonlawyer Assistants, DAJA-SC, 4 June 1993, July 1993, at 3.

*U.S. Government Printing Office: 1993 — 300-675/80010

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
05635

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL

PIN: 071923-000